

CONFLICT OR CONSENT?



The oil palm sector at a crossroads

**Edited by
Marcus Colchester
and Sophie Chao**

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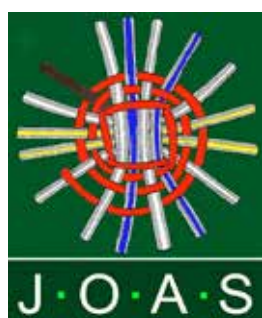
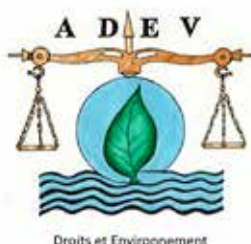
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HuMa



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Cover photo: Demonstration by Tongod villagers outside the Kota Kinabalu High Court, 15th May 2012, with placards reading 'Don't seize our rights', 'Land for livelihoods not for profiteering' / Galus Ahtoi

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Conflict or Consent? The oil palm sector at a crossroads

This volume is the seventh in a series of reports published by the Forest Peoples Programme and SawitWatch, and other partners, about the social implications of oil palm expansion. The first, *Promised land: palm oil and land acquisition in Indonesia – implications for local communities and indigenous peoples* (2006), documents the unfair way Indonesian laws allow lands to be expropriated from local people without regard for their rights. The second, *Ghosts on our own land: oil palm smallholders in Indonesia and the Roundtable on Sustainable Palm Oil* (2006), uncovered the problems faced by Indonesian smallholders in oil palm schemes. The third, *The Nagari community, business and the State: the origin and the process of contemporary agrarian protests in West Sumatra, Indonesia* (2007), provides a detailed analysis of how Minangkabau communities in West Sumatra are dealing with State-supported oil palm estates taking over their lands. The fourth, *Land is life: land rights and oil palm development in Sarawak* (2007), shows how oil palm expansion in the Malaysian State of Sarawak is systematically expropriating Dayak lands without respect for their customary rights. The fifth, *HSBC and the palm oil sector in South East Asia: towards accountability* (2008) exposes the difficulties communities face getting banks to hold client companies accountable when these companies violate standards that the banks supposedly uphold. The sixth, *Oil palm expansion in South East Asia: trends and implications for local communities and indigenous peoples* (2011) showed how palm oil is expanding in the region with very different outcomes depending on the legal framework.

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Marcus Colchester and Sophie Chao
Editors

Acronyms

ACDI	Agence Canadienne de Développement International
ACHPR	African Charter on Human and Peoples' Rights
ACLR	Assistant Collector of Land Revenues
ADB	Asian Development Bank
ADEV	Actions pour les Droits, l'Environnement et la Vie
AKPASI	Asosiasi Pemerintah Kabupaten Seluruh Indonesia/Association of Indonesian District Governments
AMA-JK	Aliansi Masyarakat Adat Jelai – Kendawangan
AMDAL	Analisis Mengenai Dampak Lingkungan/Environmental Impact Analysis
APBD	Anggaran Pendapatan Belanja Daerah/Government of Indonesia's Regional Annual Budget
APL	Areal Penggunaan Lain/Other Land Uses
ARB	Agrarian Reform Beneficiaries
BAL	Basic Agrarian Law
BAPPEDA	Badan Perencana Pembangunan Daerah/Regional Body for Planning and Development
BAS	Bernam Advisory Services Sdn.Bhd.
BPHTB	Bea Perolehan Hak atas Tanah dan Bangunan/Tax on Acquisition of Land and Building
BIC	Bank Information Center
BIMP-EAGA	Brunei, Indonesia, Malaysia and Philippines - East ASEAN Growth Area
BKPM	Badan Koordinasi Penanaman Modal/Investment Coordination Board
BLH	Badan Lingkungan Hidup/Environment Office
BOI	Board of Investment
BPD	Badan Permusyawaratan Desa/Village Assembly Board
BPMPT	Badan Penanaman Modal dan Pelayanan Perizinan Terpadu/ District Investment Coordination Board
BPN	Badan Pertanahan Nasional/National Land Agency
BPS	Badan Pusat Statistik/Central Bureau of Statistics
BRIMOB	Brigade Mobil
CADC	Certificates of Ancestral Domain Claim
CARL	Comprehensive Agrarian Reform Law
CARP	Comprehensive Agrarian Reform Programme
CB	Certification Body
CBD	United Nations Convention on Biological Diversity
CBFMA	Community-Based Forestry Management Agreement
CBMS	Community-Based Monitoring System
CDA	Cooperative Development Authority
CDC	Cameroon Development Corporation
CDM	Clean Development Mechanism
CED	Centre pour l'Environnement et le Développement
CEDAW	United Nations Convention on the Elimination of Discrimination against Women
CIP	Cameroon Investment Corporation
CLOA	Certificates of Land Ownership Agreement
CLUA	Climate and Land Use Alliance
CLUP	Comprehensive Land Use Plan
COD	Congo Oil and Derivatives
CPI	Corruption Perceptions Index
CPO	Crude Palm Oil
CRL	Community Rights Law of 2009 with Respect to Forest Lands
CRP	Conflict Resolution Process
CRT	Conflict Resolution Team
CSR	Corporate Social Responsibility

CUC	Control Union Certifications
CV	Comanditaire Vennootschap
CV ICP	CV Intergraha Citra Persada
DA	Department of Agriculture
DAD	Dewan Adat Dayak/Dayak Adat Council
DAR	Department of Agrarian Reform
DENR	Department of Environment and Natural Resources
DILG	Department of the Interior and Local Governance
Disbun	Dinas Perkebunan/Plantations Office
Dishut	Dinas Kehutanan/Forestry Office
DOST	Department of Science and Technology
DPRD	Dewan Perwakilan Rakyat Daerah/Local Parliament
DRC	Democratic Republic of Congo
DSCE	Document de Stratégie pour la Croissance et l'Emploi/Strategy for Growth and Employment Document
DSF	Dispute Settlement Facility
DTI	Department of Trade and Industry
EBRD	European Bank for Reconstruction and Development
ECC	Environmental Clearance Certificates
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
EPAA	Environmental Protection Agency Act
ERPA	Emission Reduction Purchase Agreement
ESIA	Environmental and Social Impact Assessment
EU-RED	European Union Renewable Energy Directive
FAO	Food and Agriculture Organisation
FCP	Forest Conservation Policy
FDA	Forestry Development Authority
FELDA	Federal Land Development Authority
FFB	Fresh Fruit Bunch
FLEGT	Forest Law Enforcement, Governance and Trade
FMU	Forest Management Unit
FPIC	Free, Prior and Informed Consent
FPP	Forest Peoples Programme
GAR	Golden AgriResources
GoI	Government of Indonesia
GPS	Global Positioning System
GRTT	Ganti Rugi Tanam Tumbuh/Compensation for Planted Crops
GVL	Golden Veroleum Liberia
HAM	Hak Asasi Manusia/human rights
HCV	High Conservation Value
HCVA	HCV Assessment
HDI	Human Development Index
HGA	Host Government Agreement
HGB	Hak Guna Bangunan/Right to Build
HGU	Hak Guna Usaha/Right to Exploit or Business Use Rights
HPAT	Hak Pakai Atas Tanah/Right to Land Use
HPH	Hak Penguasaan Hutan/Forest Concession
HSBC	Hong Kong Shanghai Banking Corporation
HTI	Hutan Tanaman Industri/Industrial Forest
HuMa	Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis/ Association for Community and Ecology-Based Law Reform
IADB	Inter-American Development Bank
ICC	Indigenous Cultural Communities
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDEAL	Institute for Development of Alternative Living

IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFC CAO	International Finance Corporation Compliance Advisor/Ombudsman
IFI	International Financing Institution
IGA	Income Generating Activities
ILO	International Labour Organisation
ILO C169	ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries No.169
IMB	Ijin Mendirikan Bangunan/Construction Building Permit
IPB	Institut Pertanian Bogor/Bogor Institute of Agriculture
IPF	Indigenous Peoples' Foundation for Education and Environment
IPK	Izin Pemanfaatan Kayu/Timber Utilisation Permit
IPKH	Izin Pelepasan Kawasan Hutan/Forest Area Release Permit
IPRA	Indigenous Peoples' Rights Act
IRAD	Institute of Agricultural Research for Development
ISPO	Komisi Perkebunan Kelapa Sawit Berkelanjutan Indonesia/Indonesian Sustainable Palm Oil
IUP	Izin Usaha Perkebunan/Plantation Enterprise Permit
IUP-B	Izin Usaha Perkebunan untuk Budidaya/Plantation Enterprise Permit for Cultivation
JOAS	Jaringan Orang Asal SeMalaysia/The Indigenous Peoples Network of Malaysia
KA-ANDAL	Kerangka Acuan Analisis Dampak Lingkungan Hidup/Environmental Impact Assessment Terms of Reference
KAN	Kerapatan Adat Nagari/ Meeting of the Adat Nagari
KBNK	Kawasan Budidaya Non Kehutanan/Non-Forest Cultivation Area
Kementan	Kementerian Pertanian/Ministry of Agriculture
KGB	Kumpulan Guthrie Berhad
KIP	Keterbukaan Informasi Publik/Law concerning Public Information Openness
KKPA	Koperasi Kredit Primer Anggota/Primary Co-operative Credit for Members
KLH	Kementerian Lingkungan Hidup/Ministry of Environment
KMSA	Kemitraan Manajemen Satu Atap/One Roof Management Partnership
KOMNASHAM	Komisi Nasional Hak Asasi Manusia/Indonesian National Human Rights Commission
KUH	Kitab Undang-Undang Hukum/Civil Law Code
LBP	Land Bank of the Philippines
LGU	Local Government Unit
MABM	Majelis Adat Budaya Melayu/Melayu Adat Culture Council
MIGA	Multilateral Investment Guarantee Agency
MINADER	Ministère de l'Agriculture et du Développement Rural/Ministry of Agriculture and Rural Development
MINDCAF	Ministère des Domaines, du Cadastre et des Affaires foncières/Ministry of Domains, Cadastres and Tenure
MINEP	Ministère de l'Environnement et de la Protection de la Nature/Ministry of Environment and the Protection of Nature
MINEPAT	Ministère de l'Économie, de la Planification et de l'Aménagement du Territoire/Ministry of Economy, Planning and Management of Territory
MINFOF	Ministère des Forêts et de la Faune/Ministry of Forestry and Wildlife
MK	Mahkamah Konstitusi/Court Constitution
MLME	Ministry of Lands, Mines and Energy
MMPL	Mt. Mantalingahan Protected Landscape
MMT	Multi-stakeholder Monitoring Team
MP3EI	Master Plan Percepatan Pembangunan Ekonomi Indonesia/National Economic Development Acceleration Master Plan
MPOA	Malaysian Palm Oil Association
NARRA	National Resettlement and Rehabilitation Administration
NCIP	National Commission on Indigenous Peoples
NCR	Native Customary Right
NFTP	Non-Timber Forest Products
NKT	Nilai Konservasi Tinggi/High Conservation Value

NIPT	Network of Indigenous People in Thailand
NPP	New Plantings Procedure
NPWP	Nomor Pokok Wajib Pajak/Tax Identification Number
OCBC	Overseas Chinese Banking Corporation
OECD	Organisation for Economic Co-operation and Development
OFW	Overseas Filipino Worker
OPF	Oil Palm Farming
OPT	Organisme Pengganggu Tumbuhan/Pathogenic Plant Organisms
PACOS Trust	Partners of Community Organisations in Sabah Trust
PARO	Provincial Agrarian Reform Officer
PBB	Pajak Bumi dan Bangunan/Land and Building Tax
PCA	Philippine Coconut Authority
PCDA	Philippine Coconut Development Authority
PCSD	Palawan Council for Sustainable Development
PDIP	Partai Demokrasi Indonesia Perjuangan/ Indonesian Democratic Party Struggle
Pemda	Pemerintah Daerah/Regional Government
Perda	Peraturan Daerah/Regional Regulation
PHP	Philippine peso
PILNET	Public Interest Lawyer Network Indonesia
PIR	Perkebunan Inti Rakyat/Nucleus Estate Scheme
PIR-Trans	Perkebunan Inti Rakyat Transmigrasi/Transmigration Nucleus Estate Scheme
PK	Palm Kernel
PKO	Palm Kernel Oil
PKP2B	Perjanjian Karya Pengusahaan Pertambangan Batubara/Coal Mining Agreement
PMA	Penanaman Modal Asing/Foreign Investment
PMDN	Penanaman Modal Dalam Negara/Domestic Investment
PNNI	Palawan Network of NGOs Inc.
PODO	Palm Oil Development Office
POM	Palm Oil Mill
PPAT	Pejabat Pembuat Akta Tanah/Land Deed Official
PPDCI	Philippine Palm Oil Development Council Inc.
PPMD	Program Pemberdayaan Masyarakat Desa/Independent Smallholders Scheme
PPOIDC	Palawan Palm Oil Industry Development Council
PPUBP	Persetujuan Prinsip Usaha Budidaya Perkebunan/ Estate Crops Cultivation Business Principle Approval
PPVOMI	Palawan Palm and Vegetable Oil Mills Inc.
PRC Ltd	Palm Resources Cameroon Limited
PT ANI	Perseoran Terbatas Agro Nusa Investama/Agro Nusa Investama Ltd.
PT AP	Perseoran Terbatas Asiatic Persada/Asiatic Persada Ltd.
PT BNM	Perseoran Terbatas Bangun Nusa Mandiri/Bangun Nusa Mandiri Ltd.
PT BWL	Perseoran Terbatas Buana Wiralestari Mas/Buana Wiralestari Mas Ltd.
PT IMT	Perseoran Terbatas Ivo Mas Tunggal/Ivo Mas Tunggal Ltd.
PT PHP I	Perseoran Terbatas Permata Hijau Pasaman I/Permata Hijau Pasaman I Ltd.
PT RJP	Perseoran Terbatas Ramajaya Pramukti/Ramajaya Pramukti Ltd.
PT SSS	Perseoran Terbatas Surya Sawit Sejati/Surya Sawit Sejati Ltd.
REA	Rubber Estate Agency
REDD	Reducing Emissions from Deforestation and Forest Degradation
RI	Republic of Indonesia
RKL	Rencana Pengelolaan Lingkungan/Environment Management Plan
RPL	Rencana Pemantauan Lingkungan Hidup/Environmental Monitoring Plan
RRI	Rights and Resources Initiative
RSPO	Roundtable on Sustainable Palm Oil
RSPO P&C	RSPO Principles & Criteria
RT	Rukun Tetangga/Neighbourhood Watch or village level classification of households
RUTR	Rencana Umum Tata Ruang/Macro Planning, Commodity Zoning and Spatial Plan
SATGAS	Satuan Tugas/Task Force
SATLAK	Satuan Pelaksana/Implementation Unit
SAVC	Shine Art Valley Co. Ltd.
SCEP	Social and Community Engagement Policy

SDA	Sumber Daya Alam/Natural Resources
SECD	State Environmental Conservation Department
SEFE	Struggle to Economise Future Environment
SGSOC	SG Sustainable Oils Cameroon
SIA	Social Impact Assessment
SITU	Surat Izin Tempat Usaha/Business Location Permit
SIUP	Surat Izin Usaha Perdagangan/Trade Business Permit Letter
SKPD	Satuan Kerja Pemerintah Daerah/Local Government Work Force
SKT	Surat Keterangan Tanah/Land Information Certificate
SLA	Sabah Law Association
SMART	Sinar Mas Agro Resources and Technology
SME	Small and Medium-Sized Enterprises
SOE	State Owned Enterprise
SOP	Standard Operational Procedure
SPO	Special Power of Attorney
SPOPP	Standar Prosedur Operasi Pengaturan dan Pelayanan di lingkungan Badan Pertanahan Nasional/National Standard Operational Procedure on Coordination and Treatment of Land Environment
SPPM	Surat Persetujuan Penanaman Modal/Investment Permit
SPT	Surat Pernyataan Tanah/Land Statement Certificate
SPUP	Sarana Penunjang Usaha Produktif/Plantation Business Registration Letter
STDP	Surat Tanda Daftar Perusahaan/Certificate of Company Registration
TAP MPR	Ketetapan Majelis Permusyawaratan Rakyat/Decree of the People's Representative Assembly
TBP	Time Bound Plan
TCT	Transfer Certificate of Title
TDP	Tanda Daftar Perusahaan/Company Registration Number
TFT	Tropical Forest Trust
TP3K	Tim Pembina Pengembangan Perkebunan Kabupaten/District Plantation Development Team
TPMA	Tim Pembela Masyarakat Adat/Indigenous Peoples' Defenders Team
TRPS	Tongod Regional Planning Study
UBACUDA	Upper Balung Cultural and Development Association
UKL	Upaya Pengelolaan Lingkungan/Environmental Management Efforts
UMUL	Universitas Mulawarman
UNCRC	United Nations Convention on the Rights of the Child
UNDRD	United Nations Declaration on the Right to Development
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNPFII	United Nations Permanent Forum on Indigenous Issues
UPB	United Plantation Berhad
UPL	Unit Pemantauan Lingkungan Hidup/Environmental Monitoring Efforts
UPTD	Unit Pelaksanaan Teknis Daerah/Regional Technical Implementation Unit
UUPA	Undang-Undang Pokok Agraria/Basic Agrarian Law
UU-PPLH	Undang-undang Perlindungan dan Pengelolaan Lingkungan Hidup/Law on Environmental Protection and Management
VPA	Voluntary Partnership Agreement
WALHI	Wahana Lingkungan Hidup Indonesia/Friends of the Earth Indonesia
WRI	World Resources Institute
ZO	Zoning Ordinance

Introduction

Marcus Colchester and Sophie Chao

Summary

Oil palm has become one of the world's most controversial crops. Lucrative for some, its social and environmental impacts are often severe. To avert criticism, some of the more progressive companies have promised to only finance, produce, trade and buy palm oil that is 'sustainably' produced. Since 2005, the Roundtable on Sustainable Palm Oil (RSPO) has required that member companies respect communities' legal and customary rights and only develop oil palm on their lands with their free, prior and informed consent. Are the companies keeping their promises? Have they changed the way they develop and manage lands since this new standard was adopted? This volume of 16 detailed case studies from six countries seeks to answer these questions.

The findings are sobering. While some RSPO member companies have adopted new standards and procedures, improved their practices on paper and even got some of their operations certified, on the ground not much has changed. Land grabs continue, land conflicts are escalating and too often palm oil companies, even RSPO members, pursue business as usual. While senior company staff have committed to the new approach, too often operational managers in the field have yet to be retrained. Procedures to provide remedy for impacted communities are also deficient. The voluntary approach seems to be failing.

In large part, these problems stem from unjust legal and governance frameworks which fail to protect local communities' and indigenous peoples' rights. Access to justice through the courts is absent or limited. Corrupt and unfair land deals are all too prevalent. Despite persistent calls for reform from very diverse sources, from UN

agencies and human rights bodies, regional and national human rights commissions, international financial institutions, NGOs and community organisations, there are few signs that national governments plan to change the way they hand out community lands to companies.

What is to be done? Voluntary standards must be tightened. Certification bodies must become more discerning. Supply chains must be made transparent and fully traceable. Complaints procedures and conflict resolution mechanisms urgently need strengthening. Traders and investors must get serious about which companies they will and won't deal with. Governments must change the way they regulate the industry and adjust land tenure systems so communities are secure in their rights. Without such changes, civil society will be justified in continuing to shun the sector.

The growing market for palm oil

The impacts of the rapid expansion of oil palm plantations to feed a growing global market for edible oils and biofuels have become a matter of global concern.¹ The growth of such markets, especially in China and India, but also in Eastern Europe, the Middle East and America, as well as in producer countries, are driving large investments in Southeast Asia, Africa and Latin America, leading to the contested takeover of huge tracts of land. To meet this demand, palm oil production has more than doubled in the past decade and now dominates the international market for vegetable oils.²

The perceived availability and low cost of labour as well as cultivable land in Southeast Asia have made the region a prime target

for large-scale land conversion to oil palm plantations by both domestic and foreign investors. Indonesia and Malaysia alone produce over 85% of globally traded palm oil products, with a combined plantation area of nearly 16 million ha.³ Many of the same companies are now expanding their land banks into West and Central Africa.⁴ Government policies on edible oil import substitution and bio-fuel promotion are also stimulating this expansion.⁵ With global palm oil consumption predicted to triple by 2050,⁶ the trend of rapid large-scale oil palm expansion is set to continue.

Social and environmental impacts of oil palm expansion

While international concern has focused on the environmental impacts,⁷ biodiversity loss⁸ and climate implications⁹ caused by this rapid land use change, the serious social impacts have begun to receive increasing recognition. Documented problems include widespread land conflicts,¹⁰ exploitative labour conditions,¹¹ pesticide poisoning in female sprayers,¹² land concentration,¹³ smallholder indebtedness,¹⁴ food shortages¹⁵ and denial of the rights of indigenous peoples.¹⁶ At the same time, comparative studies have shown that where the lands of farmers, indigenous peoples and local communities are secure and where there is rule of law, oil palm tends to develop modestly as a smallholder crop with better outcomes for local people in terms of income, equity and livelihoods.¹⁷ However, where land rights are insecure or law enforcement weak, then oil palm tends to be developed as very large company-owned estates with serious problems for prior occupants and workers, ensuing land conflicts and human rights abuses.¹⁸

Forest Peoples Programme (FPP) adopts a human rights-based approach to development paying particular attention to the need to protect the collective rights to lands and natural resources of indigenous peoples and other social groups with informal tenures. Over the past decade, in

close collaboration with the Indonesian NGO, SawitWatch, and other civil society groups, FPP has carried out detailed research into the way the palm oil sector addresses communities' rights. An initial study of the Indonesian legal framework and the experience of communities in six different plantation areas showed the unjust way Indonesian laws allow lands to be expropriated from local people without regard for their internationally recognised rights.¹⁹ A second study uncovered the serious problems of indebtedness and exploitative relations faced by Indonesian oil palm smallholders.²⁰ A third provided a detailed analysis of how Minangkabau communities in West Sumatra are contesting the State-sanctioned take-over of their lands by large palm oil businesses.²¹ A fourth showed that palm oil expansion in the Malaysian State of Sarawak is systematically expropriating Dayak lands without their consent.²² A fifth study exposed the difficulties that communities in both Indonesia and Malaysia face getting the investment bank HSBC to hold its client companies accountable when these companies violate standards HSBC supposedly upholds.²³ A more analytic review of all these findings drew attention to the underlying weaknesses of lands laws, land governance and policies all of which favour large-scale plantations and which lead to this widespread abuse of rights.²⁴ A comparative review of oil palm expansion in Southeast Asia showed that such problems are widespread in the region but that, where laws recognise land rights and are actually upheld, palm oil can develop as a smallholder crop without such serious social consequences.²⁵

Responses to social and environmental concerns

International concern about deforestation, climate change, biodiversity loss, human rights abuse and conflict has stimulated a very wide variety of responses. Of particular note is the setting up of the Roundtable on Sustainable Palm Oil

(RSPO), a multi-stakeholder initiative of the private sector and civil society groups, which aims to encourage palm oil expansion in ways that do not destroy biodiversity or cause social conflict.²⁶ At the same time, international agencies, such as the United Nations Special Rapporteur on the Right to Food,²⁷ the World Bank²⁸ and Food and Agriculture Organisation,²⁹ have all expressed particular concern with the way the rapid expansion of agribusinesses, notably oil palm plantations, is resulting in the impoverishment of local communities, and have called for reforms of national frameworks to secure communities' rights and ensure sound land governance.

The international human rights framework

The analyses provided in this volume adopt a rights-based approach giving particular emphasis to relatively recent advances in international human rights laws, which clarify the status and rights of indigenous peoples.³⁰ The binding legal and jurisprudential bases for the recognition of the collective rights of indigenous peoples have been exhaustively compiled by Fergus MacKay.³¹ The UN Declaration on the Rights of Indigenous Peoples, while not itself a treaty, in effect summarises these internationally recognised rights, as they apply to indigenous peoples, setting out minimum standards which States must observe.³² These include the obligation of States to recognise indigenous peoples' rights to:

- Self-determination (including self-governance and self-identification)
- Freely dispose of their natural wealth and resources
- In no case be deprived of their own means of subsistence
- Own, develop, control and use their communal lands, territories and resources, traditionally owned or otherwise occupied by them
- The free enjoyment of their own culture and to maintain their traditional way of life

- Give or withhold their free, prior and informed consent prior to activities proposed on their lands³³
- Represent themselves through their own institutions
- Exercise their customary law
- Restitution of their lands and compensation for losses endured.

It is also important to note that under international law,

violation of a human right gives rise to a right of reparation for the victims... [in order] to afford justice to victims and alleviate their suffering 'by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.' Measures to this end include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³⁴

The huge extent of the problems resulting from past land-grabs for oil palm plantations that now require remedy needs to be emphasised. For example, the National Land Bureau in Indonesia has informed public meetings at the RSPO that there are 8,000 documented land disputes in the agrarian sector in Indonesia, of which about half involve disputes with palm oil companies.³⁵

Free, Prior and Informed Consent

Free, Prior and Informed Consent (FPIC) has emerged as a principle of international law that derives from the collective rights of indigenous peoples to self-determination and to their lands, territories and other properties. FPIC is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use. In recognising these rights, the RSPO

standard accords with international laws and makes requirements of companies that go beyond the minimum standards required by national statutory law. Furthermore, the right to FPIC as phrased in the RSPO standard is applicable to indigenous peoples but also local communities more broadly.

Respect for the right to FPIC is an obligation (or legal duty) of governments that have committed themselves as members of intergovernmental bodies through their ratification or endorsement of one or more of the following instruments:

- *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*
- *International Covenant on Civil and Political Rights (ICCPR)*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*
- *Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention: C169)*
- *African Charter on Human and Peoples' Rights (ACHPR)* and
- the Conference of Parties' decisions relating to the implementation of the *Convention on Biological Diversity (CBD)*.

The United Nations Declaration on the Rights of Indigenous Peoples (2007) most clearly articulates the right of indigenous peoples to FPIC and related rights to be represented through their own institutions;

Free, Prior and Informed Consent

Free: implies no coercion, intimidation or manipulation

Prior: implies consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect of time requirements of indigenous consultation/consensus processes

Informed: implies that information is provided that covers (at least) the following aspects:

- The nature, size, pace, duration, reversibility and scope of any proposed project
- The reason(s) or purpose of the project
- The location of areas that will be affected
- A preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits
- Personnel likely to be involved in the implementation of the project
- Procedures that the project may entail

Consent: consultation and participation are key elements of a consent process. Consultation must be undertaken in good faith. The parties must establish a dialogue allowing them to identify appropriate and workable solutions in an atmosphere of mutual respect, and full and equitable participation, with ample time to reach decisions. This process may include the option of withholding consent. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives and customary or other institutions. The participation of women, youth and children are preferable where appropriate.

Source: UNPFII 2005 *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*. Document E/C.19/2005/3, submitted to the Fourth Session of the UN Permanent Forum on Indigenous Issues, 16th – 17th May.

to exercise customary law; to the ownership of the lands, territories and natural resources that they traditionally own or otherwise occupy or use; to self-identification; and, more fundamentally, to self-determination.

Private sector responsibilities

The United Nations has affirmed through the *UN Guiding Principles on Business and Human Rights* that corporations have a responsibility to respect human rights wherever they operate ‘independently of States’ willingness and/or abilities to fulfill their own obligations... and exists over and above national laws and regulations protecting human rights’.³⁶ Following up on these principles, the National Human Rights Institutions of Southeast Asia have promulgated the *Bali Declaration on Human Rights and Agribusiness*,³⁷ which clarifies how rights must be upheld by both the private sector and governments in Southeast Asia³⁸ and they have called on the ASEAN Inter-Governmental Commission on Human Rights to enforce these norms regionally.³⁹

Ahead of these international agreements, in 2003, the more progressive companies in the palm oil sector in alliance with more conciliatory NGOs established the Roundtable on Sustainable Palm Oil, which then developed a standard for the production of sustainable palm oil, adopted in 2005, against which companies could be independently audited and certified.⁴⁰ The detailed standard inter alia places an obligation on companies to: ensure transparency; respect communities’ legal and customary rights to lands; acquire land only with communities’ free, prior and informed consent; allow communities to represent themselves through their own freely chosen institutions; provide fair treatment to smallholders and; resolve disputes through mutually agreed processes.

IFC and World Bank responses

In 2007, a consortium of concerned NGOs filed a complaint⁴¹ with the International

Finance Corporation’s (IFC) Compliance Advisory Ombudsman (CAO) about serious breaches of IFC Performance Standards by its client, the trading house Wilmar, a prominent member of the RSPO, which today trades about 45% of globally traded palm oil.⁴² Based on detailed field studies,⁴³ the complainants pointed out that Wilmar’s operations were in violation of legally required environmental protection measures, taking over indigenous peoples’ customary lands without due process or negotiated agreements, and clearing lands and using fire without legally required permits. Detailed correspondence, a field visit and meetings followed which led to the CAO Ombudsman agreeing to mediate a few of the many land disputes mentioned by the complainants. The Compliance Unit was also persuaded to audit IFC staff for their adherence to the Performance Standards.

The Ombudsman was able to resolve the land disputes in three concession areas⁴⁴ and is still engaged in another Wilmar concession where serious human rights abuses occurred in 2011, when company personnel working with a company-paid mobile police brigade violently evicted 83 families from their homes and bulldozed their dwellings into nearby creeks.⁴⁵ The audit meanwhile showed that in providing financial support to Wilmar without due diligence, IFC staff had indeed violated IFC standards and procedures, had allowed financial considerations to override social and environmental concerns and should have known better, as past World Bank group experience in the sector showed that such problems were widespread. The World Bank Group’s past investments in the palm oil sector totaled some US\$2 billion, about half of which was in Indonesia, creating the models and practices that have led to the current industry. During the 1990s, the audit revealed, the World Bank Group had ceased funding oil palm development after reviews showed poor performance and quite serious impacts (and there remain concerns among affected communities and civil society in Indonesia that the World

Bank is not intending to review or remedy the problems so caused). The audit report noted that:

For more than twenty years, IFC had information at its disposal on significant governance as well as environmental and social risks inherent in the Indonesian oil palm sector. This came from World Bank experience; from the various IFC projects appraised in the sector and the country from the 1980s and onwards; and from monitoring and reporting on ongoing IFC oil palm investments in Indonesia. Despite awareness of the significant issues facing it, IFC did not develop a strategy for engaging in the oil palm sector. In the absence of a tailored strategy, deal making prevailed.⁴⁶

IFC reviews had consistently shown that IFC clients had problems with compliance with social and environmental standards, and there were problems with security forces and unresolved land disputes.⁴⁷ A joint World Bank-IFC report specifically noted that as a result of government policies to expand oil palm by favouring large companies over communities '[T]he land claims of commercial operations, usually granted from the centre, may also displace local communities or constrain their livelihood opportunities on traditionally used areas'.⁴⁸

The audit showed that IFC had only been allowed to restart funding for the sector in 2001 by promising the World Bank's Executive Board that they would shortly develop a specific strategy to avoid such problems: they have never bothered to produce this.⁴⁹ A weak management response to the audit findings⁵⁰ and further appeals by NGOs, led the World Bank President to freeze all World Bank Group funding to the palm oil sector pending the development of a new strategy in consultation with concerned parties.

The Framework and Strategy for addressing the palm oil sector that resulted⁵¹ highlights the need for an 'enabling policy and regulatory environment' which *inter alia* should provide: clear land rights for local communities and indigenous peoples; standardised, clear negotiation systems

between companies and farmers; capacity building so farmers can negotiate favourable agreements and; conflict resolution mechanisms to address disputes notably over land, debt and smallholder arrangements. Such policy prescriptions are not new and are consistent with earlier World Bank reviews, which have concluded that effective development outcomes from agricultural expansion require legal recognition of customary rights, collective tenures and traditional institutions, regularising the rights of people on State lands and addressing the inefficiencies and corruption in government land administration bureaux.⁵²

The World Bank's new Framework and Strategy also affirmed that the IFC's Performance Standards apply to the full supply chain and require that clients carry out a detailed assessment of their suppliers, develop a purchasing policy and adopt management and monitoring systems to ensure compliance with these standards and progressively effect a transition towards the purchase of oils which are produced in compliance with the RSPO standard or equivalent. These requirements are affirmed in the IFC's revised Performance Standards adopted in 2012.⁵³ Over the past six years, NGO complainants have been persistently demanding that the Performance Standard should be applied by the Wilmar Group to its full supply chain, but so far neither the IFC nor the CAO, much less Wilmar itself, has been able to address this concern. Meanwhile concerns about Wilmar's expanding operations continue to be voiced, both in Indonesia and in Africa.⁵⁴

All this has raised doubts about the effectiveness of the CAO process and about the will or capacity of the World Bank Group to implement its new Framework and Strategy. A case in point concerns IFC support for the operations of the Dinant Corporation of Honduras, which has been blamed for the deaths of numerous farmers opposing palm oil operations there.⁵⁵ The case is currently under investigation by the CAO.⁵⁶ In particular, it remains unclear how the World Bank's new approach will apply

to financial intermediaries that are supported by World Bank Group funds and investments but which then go on to invest in palm oil companies. What measures are in place to ensure they also adhere to the requirements of the new Framework and Strategy?

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

The FAO's *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* are the outcome of a two year process of inter-governmental negotiation at the Committee on Food Security. Negotiated and endorsed by 194 national governments, they set out so-called 'voluntary' standards designed to

improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security... by promoting secure tenure rights and equitable access to land.⁵⁷

The Voluntary Guidelines set out detailed provisions for the good governance of lands, fisheries and forests, which include: securing communities' rights in land, including respecting informal tenures and the customary rights of indigenous peoples; improved government capacity to administer lands transparently and without corruption; providing secure rights to women and other marginal groups; ensuring that all land transfers are effected in consultative ways, including respect for indigenous peoples' right to free, prior and informed consent; providing access to justice; ensuring dispute resolution, including through the use of customary approaches and; including options for the restitution of lands. The Guidelines repeatedly remind States that they must implement these provisions consistent with their existing obligations under international law.

Rationale

This edited volume of independent studies on Free, Prior and Informed Consent in oil palm plantations across Southeast Asia and Africa aims to provide detailed field information based on action-research to assess if FPIC is being applied adequately by companies, to expose any malpractice of palm oil companies and to argue for a strengthening of the RSPO procedures and standards where necessary. The project purposefully targeted companies and operations where anecdotal reports or community complaints suggest there are violations, but also companies with reported 'best practices', so as to stimulate a sharing of lessons learned and thereby encourage an improvement in the performance and approach of other RSPO member companies concerning the right to FPIC. Through careful field research irregularities were documented and made available to relevant parties in order to support redress.

The wider objectives of the publication and related advocacy are:

- To ensure reforms in the way palm oil companies adhere to the principle of Free, Prior and Informed Consent and respect customary rights to land when acquiring new lands for expanding their operations.
- To clean up the RSPO process so that bad certifications and coercive consents can be more readily challenged by impacted communities and concerned NGOs.
- To promote reforms in both voluntary best practice and national statutory law to secure communities rights to lands and forests and FPIC.
- To demand changes on the ground where requested by impacted communities.

The target audience of this publication includes private sector investors and companies, policy makers, national and local government officials, land administrators, managers and staff of government agencies, technicians and

professionals employed in the land sector, members of civil society organisations, and local communities affected by oil palm expansion. Strategically timed to coincide with the review of the RSPO Principles and Criteria in 2012, the findings of the case studies were also used as the basis for recommendations and inputs through RSPO multi-stakeholder working group meetings and during the public consultation period.

Methodology

The studies in this volume describe independent field investigations carried out by Forest Peoples Programme in collaboration with its local partners and grassroots level organisations with experience and knowledge in the social and environmental dimensions of oil palm, the RSPO standard, and relevant international human rights and national legal frameworks. The research teams elected to operate independent of the companies and used an interview-based approach (both structured and semi-structured) to build up an understanding of the situation on the ground. Wherever possible, efforts were made to corroborate allegations or claims from at least three sources. Verification of information obtained was also made by looking at all available documents, maps, photos and videos. Recordings were made of most meetings, as well as photographic records.

Over eight to 10 day fieldwork periods, the research teams interviewed a wide range of stakeholders, including local communities, government bodies, plantation workers and the companies, with the support of interpreters where necessary. As far as possible, the views of women, the elderly and youth in local communities were included, as well as those of formal village representatives, such as village heads and customary leaders. The independent views of other NGOs and civil society institutions active in the areas in question were also sought. On-site fieldwork was complemented by post-investigation

meetings with further relevant actors located elsewhere where necessary. Secondary sources, such as NGO publications, company audits, social and environmental impact assessments, High Conservation Value Assessments, company Standard Operational Procedures, contracts, maps, signed agreements with local communities, land tenure and social studies, press coverage and company reports were also examined. Draft reports of the studies were shared with the companies for comments prior to publication, where they had agreed to share their own documentation.

Overview of case studies

This edited volume presents sixteen case studies on Free, Prior and Informed Consent in oil palm plantations in Southeast Asia (Indonesia, the Philippines, Malaysia (Sabah and Sarawak) and Thailand) and Sub-Saharan Africa (Cameroon, Democratic Republic of Congo and Liberia). The studies follow a similar structure to facilitate the comparison of different elements across the various cases and geographic regions.

A brief description of the region, administration and ecology of the area in question is followed by an examination of the peoples who inhabit it, their history of land occupation and use, their customary systems of land tenure, governance, transfer and inheritance, and where there are multiple ethnicities, how these peoples relate to each other and regulate relations with respect to land and natural resources. The relation of the State to these peoples is then discussed in terms of governance and administration, exercise and formal recognition of customary laws and land rights.

An overview of the company operation studied sheds light on the nature of the land acquisition in question, the permits obtained by the company, anticipated or realised land conversion, and information from social and environmental impact assessments where available. This is

complemented by an analysis of the legal status of the company's rights to the land under national laws, and the identification of irregularities where applicable.

A substantial portion of each case study is devoted to perspectives from local communities themselves on the operations of the company and the extent to which their right to FPIC has been respected. The main obstacles for local communities to securing their lands and exercising their right to FPIC are also identified. This is followed by an examination of what the government and the company has done (or prevented from being done) to allow recognition of customary rights to land, and to give communities the opportunity to give and withhold consent to developments on these lands, in line with voluntary standards of the RSPO, national laws and international human rights legislation. Drawing from field data and interviews with all relevant stakeholders, the studies conclude with recommendations made by communities, the company and the relevant State agencies to facilitate secure land rights and respect for Free, Prior and Informed Consent.

This book is divided into country or continent sections, beginning with six case studies and one update from Indonesia. One case from the Philippines, two from Malaysia and one from Thailand complete the Asian case studies. The final five case studies are from Africa, namely Liberia, Cameroon and the Democratic Republic of Congo.

Chapter 1: PT Agrowiratama and the Melayu and Dayak peoples of Sambas, West Kalimantan—

PT Agrowiratama is a subsidiary of the Musim Mas group, one of Indonesia's biggest producers in the vegetable oil refining and soap manufacturing industries, with plantations in North, West and South Sumatra, and Central and West Kalimantan. Musim Mas was the first Indonesian company to join the RSPO in 2004. PT Agrowiratama is one of Musim

Mas' four estates in Sambas District, West Kalimantan, which together cover a potential area of 30,000 ha, of which PT Agrowiratama covers 9,000 ha. The area in question is populated primarily by Melayu and indigenous Dayak groups.

Two communities in the area (Tengguli and Mekar Jaya) have opposed oil palm for several years, even before the Musim Mas group began to invest in the area. The lands of the village of Mekar Jaya fall right in the middle of the location permit that was granted to PT Agrowiratama. In addition to this conflict, there are also ongoing conflicting land claims between the local communities working and living on the land, and those of a feudal Melayu elite based in the local cities.

PT Agrowiratama is one of the first companies in Indonesia to go through the RSPO's New Plantings Procedure (NPP) which was adopted in 2010. The purpose of the procedure is to ensure that companies start off on the right track and do not clear primary forests or areas with High Conservation Value (HCV), or take over lands without consent, thus disqualifying the operation from certification later. In line with the NPP requirements,⁵⁸ the company posted information about its planned expansion in Sambas in early 2011. The company then excised around 1,000 ha of land from their concession for local communities inhabiting the area, a measure celebrated on NGOs' websites as an example of the effectiveness of the procedure and the responsiveness of the company. The case was thus chosen as a study, as it apparently showed the positive impact of RSPO procedures from which useful lessons might be learned.

Chapter 2: PT Surya Sawit Sejati and the Waringin people of Kotawaringin Barat, Central Kalimantan—

PT Surya Sawit Sejati (PT SSS) is owned by Malaysian company United Plantations Berhad (UP), a member of the RSPO since 2006 and one of the main plantation companies

in Malaysia, where it operates 12 plantations covering over 38,000 ha. The company has expanded into Indonesia and plans to develop its total land bank of 40,000 ha. PT SSS was acquired by UP in April 2006 and covers an area of 15,550 ha in Kotawaringin Barat district, Central Kalimantan. This area is inhabited by several ethnic groups, including the indigenous Waringin, as well as Runtu peoples and settlers from Java, Madura and Bugis (Sulawesi).

At the end of 2007, preparations were made for PT SSS to be audited for RSPO certification. Opposition to the project by local communities led to social conflict in 2008 in which four Runtu villagers were detained and interrogated by the police, following a report filed by PT SSS accusing them of obstructing business operations and battery/assault. Despite these conflicts, the auditing process went ahead and PT SSS was certified in August 2008. Numerous protests have been held to date by local community members to halt the company's operations and demand dialogue and consultation with the company over its activities.

Chapter 3: PT Mustika Sembuluh and the Dayak Temuan of Central Kalimantan—

PT Mustika Sembuluh is a subsidiary of Singapore-based multinational company Wilmar International, one of the largest agribusiness corporations in Asia, and member of the RSPO since 2005. PT Mustika Sembuluh was established in 1999 and covers an area of 22,000 ha. Composed of three estates and one mill, it is one of seven Wilmar subsidiaries in Central Kalimantan and extends over parts of two districts (Kotawaringin and Seruyan) and three sub-districts (North Mentaya Ilir, Telawang and Danau Sembuluh). PT Mustika Sembuluh is among the first of Wilmar's holdings in Indonesia to have been assessed against the RSPO standards and also the first oil palm plantation company in Kalimantan to receive RSPO certification.

Local communities are mostly comprised of indigenous Dayak Temuan peoples,

who claim to have been living in this area for at least 150 years, as testified by their ancestral graves. Many of these communities have experienced land conflicts and forced displacement due to oil palm expansion on their customary lands since at least 1996, prompting repeated community protests and ensuing investigations and mediation by local and international NGOs. Water pollution due to effluents from the company's mill have also been reported and complaints raised against the company and to the local government. Non-conformances were also raised in PT Mustika Sembuluh's RSPO audit over ongoing land disputes, consultation with communities over customary rights and usage of land, monitoring and surveillance of HCVs and management of social impacts. Part of the assessment team's objectives was therefore to ascertain whether and to what extent identified non-conformances have been resolved on the ground to the satisfaction of the parties involved.

Chapter 4: PT Permata Hijau Pasaman I and the Kapa and Sasak peoples of Pasaman Barat, West Sumatra—

PT Permata Hijau Pasaman I (PT PHP I) is another subsidiary company of the Wilmar group. The concession was established in 1992 in Pasaman Barat, West Sumatra and covers an area of 1,600 ha. A significant portion of this area is composed of swamp lands, farmland, mangrove forests and peatsoils which were subsequently cleared and drained at the beginning of the operations, with significant impacts on the livelihoods of the indigenous Kapa and Sasak peoples.

The process of land acquisition in this particular case is reported to have been characterised by selective consultation between the company and co-opted community representatives who failed to represent the views of their wider communities. Conflict has led to various arrests and a court case was ongoing at the Supreme Court of the Republic of Indonesia at the time of writing.

Other reported disputes relate to plasma allocation and compensation payment. Legal questions have also been raised as to the commencement of land clearance and planting before the company obtained its environmental and land use licenses. PT PHP I has yet to be certified by the RSPO, and was planning to conduct HCV assessments and fulfill other RSPO requirements before being assessed for certification at the time of writing.

Chapter 5: PT Rea Kaltim Plantations and the Dayak and Kutai peoples of Kutai Kartanegara and Tabang, East Kalimantan—

PT REA Kaltim Plantations is one of six oil palm concessions in East Kalimantan owned by REA Holdings PLC, a British company listed on the London Stock Exchange. The company REA Holdings PLC finds its origins in a London-based plantation agency house called The Rubber Estate Agency Limited (hence REA), established in 1906, and is reportedly one of the first British companies set up for the purpose of financing the acquisition of rubber estates and of acting as secretaries and agents of rubber and other plantation companies. PT REA Kaltim plantations, located in Kembang Janggut sub-district of Kutai Kartanegara district and a smaller part in Tabang sub-district, began its operations in the early 1990s and now covers an area of 30,000 ha. REA Holdings PLC joined the RSPO in 2007 and PT REA Kaltim Plantations received its certification in 2011.

PT REA Kaltim Plantations is composed of two mills, a supply base of six estates, a Plasma Scheme and an Independent Smallholders Scheme, or PPMD (*Program Pemberdayaan Masyarakat Desa*). Under the PPMD, community members are provided with seeds, fertilisers and pesticides by the company with which to cultivate their own small plots of land, and sell their fruit to the company via a cooperative. A significant portion of the concession has been enclaved as a conservation area for the protection of endangered species and habitats.

At least nine villages are located within the concession, most of which are inhabited by indigenous Dayak Kenyah and Dayak Kunjung peoples, as well as Kutai peoples, and a small number of Javanese, Chinese, Banjar, Bugis and Malays. Communities from several villages lay claim to land within the concession, but land claims are difficult to ascertain as no participatory mapping of village, HGU permit (Business Use Rights) and concession boundaries had been carried out at the time of writing.

Chapter 6: PT Bangun Nusa Mandiri and the Dayak Jelai and Dayak Kendawangan peoples of Ketapang district, West Kalimantan—

PT Bangun Nusa Mandiri (PT BNM) is a subsidiary of SMART and fully owned by Golden AgriResources (GAR), the second largest integrated palm oil company in the world. GAR became an RSPO member in 2010 following strong campaign pressure and criticism from Greenpeace and other NGOs with regards to the sustainability of its operations. SMART manages all of GAR's plantations in Indonesia, which in 2011 covered over 400,000 ha, inclusive of plasma plantations. PT Bangun Nusa Mandiri was established in 2004 and is located in the sub-districts of Tumbang Titi, Marau, Manis Mata and Air Upas in Ketapang district, West Kalimantan. The company officially began operations in 2008 and now covers an area of around 24,000 ha. Since its inception, the company has expanded its plantations and was planning to establish a palm oil processing mill at the time of writing.

The local communities living within and adjacent to PT BNM are primarily indigenous Dayak Jelai and Dayak Kendawangan peoples, whose livelihoods are intrinsically tied to the lands and forests which they use and manage in accordance with customary laws and practices. One particular village, Silat Hulu, has sustained its opposition to the oil palm company's developments on their customary lands, which were bulldozed and cleared repeatedly throughout 2008 without the

consent of the community. Continued clearing in September 2009 led to protests by Silat Hulu community members who seized company operational machinery, demanding respect for customary rights and compensation for destroyed and lost crops and land.

Two of the community members involved in this protest were taken to court at the Ketapang District Public Court and the Provincial Public Court in Pontianak, and accused of having violated the Plantation Law by intentionally taking action to cause damage to PT BNM's plantation and assets. Public Interest Lawyer Network Indonesia (PILNET) brought the case to the Constitutional Court in Jakarta for Judicial Review of the Articles of the Plantation Law which the individuals were accused of having violated, highlighting how these Articles allow the criminalisation of any unspecified action or behaviour that is deemed to undermine the operations of oil palm companies, leading to risks that these clauses may be abused and misused by companies to the detriment of local communities.

In a decision of huge significance beyond this particular case and for the palm oil sector more broadly in Indonesia, the **Constitutional Court found Articles 21 and 47 of the Plantation Law to be contrary to the Constitution of the Republic of Indonesia 1945 and both Articles have now been removed from the Plantation Law.**

Chapter 7: Update on IFC CAO mediation in PT Asiatic Persada (Jambi, Indonesia)—

This brief section provides an update on the process of and challenges to IFC CAO mediation in Wilmar concession PT Asiatic Persada, which began in 2012 following a complaint to the IFC CAO on human rights abuses and land conflicts. The update raises a number of wider systemic concerns with the application of the IFC's Performance Standards to the full 'supply chain' from producer to retail, which to date remained unaddressed.

Chapter 8: Overview of the palm oil sector and FPIC in Palawan—

The Philippines case study provides an overview of the palm oil sector in the Philippines, including patterns of production, key investors, location of plantations, government targets for planned expansion, and socio-economic impacts of the sector on local communities. Drawing from research carried out in the plantation of Agusan Plantations Inc. and Agumil/PPVOMI in the municipality of Sofronio Española, southern Palawan, the study examines whether and how existing national policies in the Philippines related to Free Prior and Informed Consent can serve as sufficient social safeguards in the absence of RSPO membership to date among palm oil growers the Philippines. Agusan Plantations Inc. was established in 1993, as a Malaysian-Singaporean-Filipino partnership. Its first plantation of 1,800 ha was developed in Trento, Agusan del Sur. The plantation in Palawan commenced with the establishment of a nursery in 2006, followed by planting in the outlying Anchor and Cooperative areas in 2007. The plantation now covers around 4,000 ha.

Local communities in the area are a mix of settlers primarily from the Western Visayas and Luzon and a small number from Sulu/Tawi-tawi. There are also communities of indigenous Palaw'an, who are mainly settled inland and in the timberlands. Formalised processes to respect the right to FPIC of these communities were not conducted by the company or government prior to the acquisition of the land by the company, since under the laws of the Philippines, FPIC is confined to indigenous peoples and the company maintains that it is not planting within indigenous territories. This assertion is disputed by some indigenous peoples within the concession who, while agreeing that the lands may have been covered by the Agrarian Reform or are lands covered by tenurial instruments such as Community-Based Forestry Management Agreements (CBFMA), affirm that these lands are nevertheless historically part of their customary ancestral domain.

Chapter 9: Sarawak: IOI-Pelita and the community of Long Teran Kanan—

Originally a local joint venture company, Rinwood-Pelita, IOI-Pelita was acquired in 2006 by IOI, one of Malaysia's larger home-grown business conglomerates. Plantations are IOI's biggest income generator, making at June 2009, about 65% of the conglomerate's profits. The group operates 152,000 ha of oil palm plantations in Malaysia and 83,000 ha in Indonesia. IOI is a member of the RSPO since 2004.

The concession of IOI-Pelita covered an area of around 9,000 ha at the time of writing. Located in the middle Tinjar River in the foothills of the Dulit Range in Northern Sarawak, Malaysia, it overlaps with the customary lands of communities of the Berawan, Kayan and Kenyah peoples. As part of its due diligence in acquiring the property IOI took note of the fact that the affected communities were disputing Rinwood-Pelita's Provisional Leases in the courts. Although some compensation was paid, those receiving compensation were pressured to not try to reclaim their lands and IOI-Pelita did not settle claims to the much wider areas previously taken over by Rinwood-Pelita.

In 1997, after efforts by the community of Long Teran Kanan to persuade the company to withdraw from their lands had failed, the community, represented by four named plaintiffs, filed a case in the High Court in Miri against LCDA (Pelita), Rinwood and the State of Sarawak Government. Through a detailed examination of this case, the study reveals the complexities of law relating to customary rights recognition in Sarawak and also exposes the problems with four parallel systems of dispute resolution that are at play, including: the company's procedures; the national courts; the RSPO's grievance procedure and; the RSPO's Dispute Settlement Facility. Despite all these efforts, the dispute remains unresolved, 16 years later.

Chapter 10: Sabah: Genting Plantations and the Sungai and Dusun Peoples—

Tanjung Bahagia Sdn Bhd is a subsidiary

of the Kuala Lumpur-based Malaysian company Genting, which has interests in real estate development, casinos, tourism as well as palm oil. The concession is located in the heart of Sabah over an area of around 8,000 ha. These same lands are claimed by the Sungai and Dusun peoples of Tongod district in the headwaters of the Kinabatangan river, who are recorded to have inhabited the area since long before the British colonial era. After unsuccessful attempts at dialogue with the company and appeals to the government, the communities took their case to court in 2002. During the past 11 years, the case has proceeded laboriously through the hierarchy of high courts, appeals courts and the Federal Court but owing to sustained objections by the defendants the communities' pleadings have yet to be heard. The case exemplifies the tensions between the RSPO's voluntary standard, which requires respect for customary rights and the right to Free, Prior and Informed Consent, and the State's laws and land allocation procedures, which deny these same rights.

Chapter 11: The Mani people of Thailand on the agricultural frontier—

The short diagnostic survey carried out in Thailand examines the situation of the Mani people, a group of 'negrito' hunter-gatherers who live in the forested Bantad Mountains along the watershed between Satun, Patthalung and Trang Provinces in Southern Thailand. The Mani way of life is profoundly shaped by their foraging mode of living, which includes hunting, fishing, gathering and the use of a very wide range of forest products for their own welfare, for subsistence and also for trade. Since the 1960s, the area which the Mani inhabit has experienced a dramatic expansion of tree crops, mainly rubber and more recently oil palm, that has led to very rapid forest clearance, road-building and forest colonisation. Rubber and oil palm have been planted on most of the available lands between the coast and the mountains. As in many other parts of Thailand this rapid expansion of monocrops has been driven by

smallholders and local capitalists rather than by large-scale plantations companies. The study seeks to ascertain the situation of the Mani people in relation to this agricultural expansion, make their plight better known and consolidate links between them and the indigenous peoples of the North.

Chapter 12: Sime Darby oil palm and rubber plantation in Grand Cape Mount county, Liberia—

Sime Darby Plantations (Liberia) Incorporated is a subsidiary of Malaysian multi-national conglomerate Sime Darby, whose oil palm plantations division accounts for more than half of its profits. As of mid-2009, Sime Darby's land bank in Malaysia and Indonesia amounted to 631,762 ha, the vast majority of it being planted with oil palm. Sime Darby has now added 220,000 ha of land in Liberia to its plantation estate via the 2009 concession agreement with the Republic of Liberia. It is also understood that the Republic of Cameroon has made a commitment to providing Sime Darby with 430,000 ha of land in Cameroon for palm oil and rubber, of which 40,000 ha has been allocated.

The Liberian concession agreement for the Sime Darby Plantations oil palm and rubber concession was entered into in April 2009, and provides a lease of land for 63 years, renewable for a further 30 years, over an area of 220,000 ha. The company states that its operations in Grand Cape Mount currently amount to around 12,514 ha. Sime Darby has embarked on clearing and planting 10,000 ha of land adjacent to the existing rubber plantation in Grand Cape Mount and Bomi counties, of which at least 4,000 ha had been cleared for planting at the time of writing. Clearing was ongoing during the fieldwork for this study in February 2012.

Sime Darby Plantations came under sharp national and international focus due to a complaint by local Vai communities (one of the 16 principal ethnic groups in Liberia) affected by the concession, submitted under the RSPO New Plantings Procedure (NPP) in November 2011. The complaint

claimed that their Free, Prior and Informed Consent had not been sought, and that the destruction of their farmlands by the company clearing to plant palm oil was leaving them destitute. Encouragingly, civil society advocacy led both Sime Darby and the Liberian government to acknowledge shortcomings in their procedures and take steps towards improving their practices, remedying problems, addressing complaints and revising existing land laws and policies in Liberia.

Chapter 13: Summary study on Golden Veroleum Liberia—

This brief summary provides an update on the situation in Golden Veroleum Liberia's 220,000 ha concession, acquired by the company in August 2010 and located in the southern counties of Sinoe, Grand Kru, Maryland, River Cess and River Gee. Community grievances concerning the loss of land to the company, the destruction of crops and water sources, the lack of respect for communities' right to free, prior and informed consent in land acquisition and associated allegations of intimidation, arrests and harassment, led to a complaint submitted to the RSPO in October 2012, which led to the RSPO requesting a freeze in plantation development, pending resolution of the complaint in December 2012. The Tropical Forest Trust (TFT) was subsequently contracted by GVL to complete an independent assessment of GVL's operations with reference to FPIC compliance, which largely confirmed community concerns about GVL's operations. The summary documents whether and how GVL has taken the necessary steps to remedy community grievances and whether progress has been made in terms of respect the communities' right to FPIC.

Chapter 14: The BioPalm oil palm project: A case study in the Département of Océan, Cameroon—

BioPalm Energy Ltd is a subsidiary of the Singapore-based SIVA Group which operates in Cameroon through a subsidiary

called Palm Resources Cameroon Limited. BioPalm was in the early stages of permit acquisition and land identification at the time of writing, and while BioPalm is not currently listed as one of the companies with RSPO certification, it has committed to setting up its operation in adherence with stringent sustainability policies for palm oil production as defined by the RSPO Principals & Criteria standards. The exact location and size of the concession remains unconfirmed by the company and relevant government bodies, and ranges from 3,300 ha to 200,000 ha as per the MoU between BioPalm and the Ministry of Agriculture and Rural Development.

Field visits indicate that the initial phase of the BioPalm project targets an area used by four villages and will overlap with community land use and possibly also with an existing logging concession. These lands are inhabited by two main ethnic groups; the Bassa, who are primarily agriculturalists and the Bagyeli, who are traditionally hunter-gatherers. The land near the villages where the BioPalm project will go ahead is already a source of tension between these groups, in which the hunter-gatherer Bagyéli often find themselves in a weaker position, due to lack of access to information, inadequate representation and endemic racial discrimination. All the Bagyéli communities interviewed in the four villages were against the project. The chiefs of three villages submitted petitions to the President of the Republic of Cameroon and the Governor of the Province in 2012, stating that they had neither been officially informed nor consulted regarding the negative impacts of the plantation on their livelihoods and forests.

Chapter 15: SG Sustainable Oils Cameroon PLC (SGSOC) in South West Cameroon—

SG Sustainable Oils Cameroon PLC (SGSOC) is owned by American company Herakles Farms, an affiliate of Herakles Capital, an Africa-focused private investment firm involved in the

telecommunications, energy, infrastructure, mining and agro-industrial sectors. SGSOC claims to have obtained rights to 73,086 ha of land in the Ndian and Kupe-Manenguba Divisions of Southwest Cameroon through a 99-year land lease. The company intends to develop 60,000 ha of land for oil palm nurseries, plantations and processing plants. The remaining 12,000 ha will 'be protected as zones for environmentally or socially sensitive resources, plantation infrastructure and social infrastructure, and lands for village livelihood activities.' By December 2012, SGSOC had planted four palm nurseries and cleared over 60 ha of forest to this end. The company has reportedly applied for a land lease covering the 73,000 ha it hopes to exploit.

The area in question is home to several ethnic groups, including the Mbo, Bassosi and Mboum Nsuanse, Bima, Ngolo and Batanga peoples, many of whom are ardently opposed to the oil palm project. The company has been taken to the Mundemba High Court by local NGO Struggle to Economise Future Environment (SEFE) in relation to its Environmental and Social Impact Assessment. The judge granted an injunction on the development of the oil palm plantation until the legal issues were resolved. However, SGSOC continued its activities in violation of the court moratorium, which was eventually lifted on 27th February 2012.

SGSOC's project has been the subject of great controversy over the past two years. Local communities, conservation groups, and NGOs have expressed opposition to the project due to its numerous negative social and environmental impacts. However, Herakles claims the project will contribute to socio-economic development and environmental protection in the region. In September 2012, the firm withdrew their application for membership of the RSPO in reaction to a formal complaint lodged against them and widespread criticism of their project. Since SGSOC's withdrawal from the RSPO, tensions between proponents and opponents of the project have been exacerbated. Protests

from local communities have been met with arrests and physical assaults.

Chapter 16: Democratic Republic of Congo: Congo Oil and Derivatives, SARL—Congo Oil and Derivatives SARL (COD) is a 10,000 ha oil palm concession located in Bas-Congo province, Muanda Territory. While the company claims to be entirely Congolese, a guarantee from MIGA (Multilateral Investment Guarantee Agency) was approved in 2009 to promote the investment of Lebanese companies in COD. At the time of writing, the project was still in its initial stages and consultations are underway between COD, Dutch NGO SNV and the producers.

The inhabitants of the area are the Woyo, Mbalamuba and Mamboma peoples, all of whom depend primarily on the forest for their livelihoods, including the two forest reserves – Muba and Kiemi – which overlap with COD's concession. Analysis of the contracts signed for the allocation of this concession reveal major violations of the Forestry Code, and provides important insights on major discrepancies between forestry and land laws on paper and in practice in DRC, unharmonised involvement and information-sharing between relevant government bodies, and the potential clearing of large parts of two major forest reserves, theoretically protected from conversion under existing national legislation.

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1 PT Agrowiratama and the Melayu and Dayak peoples of Sambas, West Kalimantan

Marcus Colchester, Sophie Chao, Norman Jiwan, Andiko, Intan Cinditiara, Hermawansyah and Emilola Kleden

Introduction

PT Agrowiratama is a company of the Musim Mas group and member of the RSPO. It is also one of the first companies in Indonesia to go through the RSPO's New Planting Procedure (NPP).¹ In line with the NPP requirements, the company posted information about its planned expansion in Sambas in early 2011.² The company then excised around 1,000 ha of land from their concession for local communities inhabiting the area, a measure celebrated on NGOs' websites as an example of the effectiveness of the procedure and the responsiveness of the company.³ The case was thus chosen as a study, as it apparently showed the positive impact of RSPO procedures from which useful lessons might be learned. However, the investigation showed that both the story and the lessons to be learned from it are far more complex, but nonetheless valuable.

Area in question

PT Agrowiratama is located in the province of West Kalimantan, one of the four Indonesian provinces of the Indonesian part of the island of Borneo. The capital of West Kalimantan is Pontianak and the borders of the province roughly trace the mountain ranges surrounding the watershed of the Kapuas River, which drains most of the province. The area of West Kalimantan is 147,307 km² with a population of nearly four and a half million in 2010, of which nearly 30% live in or close to Pontianak city. PT Agrowiratama is located in Sambas regency, one of the twelve regencies (*kabupaten*) of the province, located in the north-west of West Kalimantan. Inhabited by around

half a million people and covering an area of roughly 6,400 km² over 19 sub-districts (*kecamatan*), Sambas is bordered by Sarawak (Malaysia) in the north, Singkawang city in the south, the Natuna Sea in the west and Bengkayang regency in the east.

In 2008, the forest sector contributed about half of the GDP of West Kalimantan with a further USD \$1.35 million from the agricultural sector, with a strong investment in estate crops, particularly oil palm. Other growing sectors are mining (gold, quartz, nickel and other minerals), manufacturing and tourism, which together contribute around 40% of the provincial government's revenues. Poverty remains a significant issue with the Human Development Index (HDI) below the national average and average income across the province at only USD \$627 per year.⁴

The peat swamp forest of West Kalimantan, covering an area of 1.7 million ha, is one of the largest natural ecosystems in the Indonesian rainforest. Forests extend along the coastal plain and along the rivers inland within the upstream section of the Kapuas river.⁵ The national forest estate consists of an area of about 90,000 km² of which over half is zoned as permanent production forest. Only 5,000 km² of the production forest designated for conversion remains, attesting to the rapid expansion of estate crops in the province. Conversion of forest lands on peats to estate crops and the proliferation of fire through the dry seasons has been a significant historical factor in the high levels of greenhouse gas emissions from the province and the degradation of biodiversity.⁶ Most of the peat swamp forest in Sambas has been disturbed due to logging and conversion to

oil palm plantations and other agricultural lands, such as for rubber, coffee, pineapple and other fruits plants. In 2007–2008, 27% of deforestation was ascribed to oil palm, including 40% of all peat land deforestation.⁷

History, peoples and land tenure

Sambas has a long though not well documented history. It is known to have been the location of a Malay⁸ Sultanate as far back as the 15th century, the ruling family of which claimed links with Johor and Melaka and intermarried with the ruling families in Brunei, Sarawak and Pontianak, among others. The Dutch only asserted authority over Sambas from the mid-19th century, but they instituted a system of indirect rule thereby allowing the family of the Sultan to retain power and authority over his subjects. Although commerce began to be increasingly controlled by the Dutch, the Sultan's family retained its authority through the Japanese occupation, ruled through a council at the death of the last Sultan in 1946, and was only finally disbanded in 1956 under President Sukarno's populist administration. The Melayu of Mekar Jaya, one of the four communities affected by the company, recall a story that in 1921 rulers of Sambas had planned to establish a kraton in the village of Kuayan and had even started constructing it there before abandoning the project. Respect for the ancient authority of the Sultan's family remains strong.

The population of Sambas district comprises a variety of different peoples, the majority of whom today can be grouped in self-identifying categories as Malays (*Melayu*), Dayaks and Chinese. The estate examined here, PT Agrowiratama 1, overlap the lands of four administrative villages (*desa*) Mekar Jaya, Beringin, Sabung and Lubuk Dagang. The former two are mainly populated by Melayu while the latter two are mainly Dayak. Sabung actually contains a transmigration settlement made up of 150 families, half of whom are locally transmigrated Dayak and the others being Javanese from east, central

and west Java. The community of Mekar Jaya includes about 30 Chinese.

The *Melayu* interviewed for this study in Mekar Jaya and Beringin are sure that they have been in the current area at least since the 1920s and almost certainly much longer. The oldest land registration document held by anyone in the village dates from the 1930s. The people are largely self-sufficient making their living from wet rice grown in paddies, from shifting cultivation, minor livestock-raising, the collection of non-timber forest products especially vegetables and some fishing. Timber for their houses also comes from the local forests.⁹ Quite extensive rubber gardens are the main source of cash income although pepper and fruit trees, notably *rambutan*, are also quite widely cultivated. Being near Sambas town, a number of people also travel to work on neighbouring estates and industries.

Until recently, the communities along the Sambas Kecil river did not experience land shortage. The main limit of agricultural production was labour. Accordingly, as we were told, farmers operated within well-known but not very strict rules with respect to land. By tradition,¹⁰ farmers who open land are considered to become owners and retain rights in the land thereafter. Ownership thus derives from working the land and from social recognition in the community. In common with Dayak customs in West Kalimantan, a farmer also has first rights to open land inland from their current holding.

Where geography brings neighbouring farmers to have overlapping claims to open new land, their differences are usually settled amicably by discussion but where this is not possible elders from the hamlet or if necessary the village, those with the best knowledge of the areas in contention, may be brought in to advise on how to settle disputes. However, at the village level there are no customary authorities charged with adjudicating land disputes as there are among the Dayak. As among Dayaks, these Melayu farmers retain rights in fallowed

lands, part of the forest regeneration in rotational farming cycles: such lands are known as *belokar* (scrubland) but their ownership is known by all.

Buying and selling lands has become increasingly common and today a large proportion of rubber gardens are registered with the village administrative office, which for a fee of about US\$12 will provide land owners with a letter, *surat pertanyaan tanah* (SPT), defining the plot of land that they own. While not an official land title, these deeds are accepted as proof that the farmer has rights to use the land and they tend to be used as a basis for land tax.

Reflecting on the way that the land tenure system has begun to change one old farmer noted ruefully that in the past land ownership was:

... a custom based on trust. Back then no letters were necessary. Even taxes were not based on letters, they were based on trust too. Now they require documents for everything and these SPT they cost money.... In the past we elders trusted each other but today there is less trust and we need written evidence and that is a problem. With the younger generation trust has been diminished.

As for the forests used by villagers for the collection of forest products these are considered to belong to the village as communally held lands and villagers, referred to as *pengurus hutan* (forest wardens), are charged with looking after these areas, although we did not have time to clarify their exact role. Today these areas are known as *hutan bersama desa* (common village lands) but the *desa* system was only actually introduced into the area in the early 1980s: before villages were known as *kampung*. The *Melayu* of Mekar Jaya recognise that forests are charged with spiritual power but while they know neighbouring Dayak groups actually locate these forests in sacred sites, the *Melayu* have no sacred places apart from grave sites.

Although Malay aristocrats tend to have patrilineal systems, in Mekar Jaya and

Beringin lands are inherited cognatically being given equally to male and female heirs, although the few adherents to stricter forms of Islam have taken to giving half shares to female heirs in accordance with sharia law. In practice, lands tend to be allocated by elders to their heirs when they get old rather than at death, maintaining the association between land ownership and those who actually work the land.

Until very recently, the boundaries between these villages were not strictly defined at least from the *Melayu* point of view. It was only with advent of oil palm into the area that land began to be precious and in short supply. Hence along the fuzzy and porous boundaries between villages, lands have been opened up for shifting cultivation, rubber and other crops and SPT been allocated in such a way that they intermingle somewhat with gardens from neighbouring villages. This has caused problems when village boundaries were later more precisely delineated.

The palm oil sector in Sambas

The district of Sambas has come late to the palm oil sector. According to figures supplied by government officials interviewed during this study, of about 400,000 ha of land in the district, since 2004, no less than 240,000 ha have been handed out to 35 oil palm companies. Most of these operations are still in the early stages of licensing, planting and production. Only 52,000 ha are actually planted and only one mill is currently available to process fresh fruit bunches into crude palm oil and kernel oil within the district. A second mill with 6,000 ha of attached estates is expected to come on line later this year. The district thus lacks capacity to process all its fruits and is thus losing both revenue and quality as fruits degrade by being driven long distances to be processed, some being sent as far as Pontianak, over 200 kilometres to the south. The government officials interviewed freely volunteered the information that there are many problems with palm oil expansion

in the area and that the district is new to handling these challenges.

As explained by these officials, the two main problems are the clearing of lands claimed by communities and smallholdings not being provided to communities as required by law. The Government emphasises that it lacks the capacity, skills, procedures and budget to deal with these land conflicts. For example, we were told, in contrast with the trillions of rupiah being invested by companies in the estates, the Monitoring and Evaluation Unit of the office overseeing investments has an annual budget of only IDR 50 million (US\$ 5,400) with which it is expected to look into the actions of all 35 oil palm companies and a myriad other enterprises. In the circumstances, the officials are rarely able to even visit estates and so tend to only investigate cases when protestors demand a government response.

Most of the companies, it is admitted, are not complying with the law and required procedures, while in comparison the RSPO member companies are relatively 'serious'. 'They want to get all the permits in proper sequence and even chase the local government to supply them.' Still, the same official informed us, even with the RSPO companies the situation is not perfect and there are land conflicts. 'The companies face the same challenges in approaching the communities', he explained.

The government admits that it does not know where people cultivate their lands. It expects the (unsupervised) companies to first carry out a land survey to establish that the land for which it seeks a license does not overlap other permits and then, once armed with a location permit issued by the regent, to carry out land surveys and then acquire lands from the community members. Whereas, the same official noted, ideally land clearance permits (IUP) should only be issued by the local government after land acquisition has been completed, in fact they are often issued before land conflicts are dealt with. Only after satisfying a number of other requirements is a final permit to

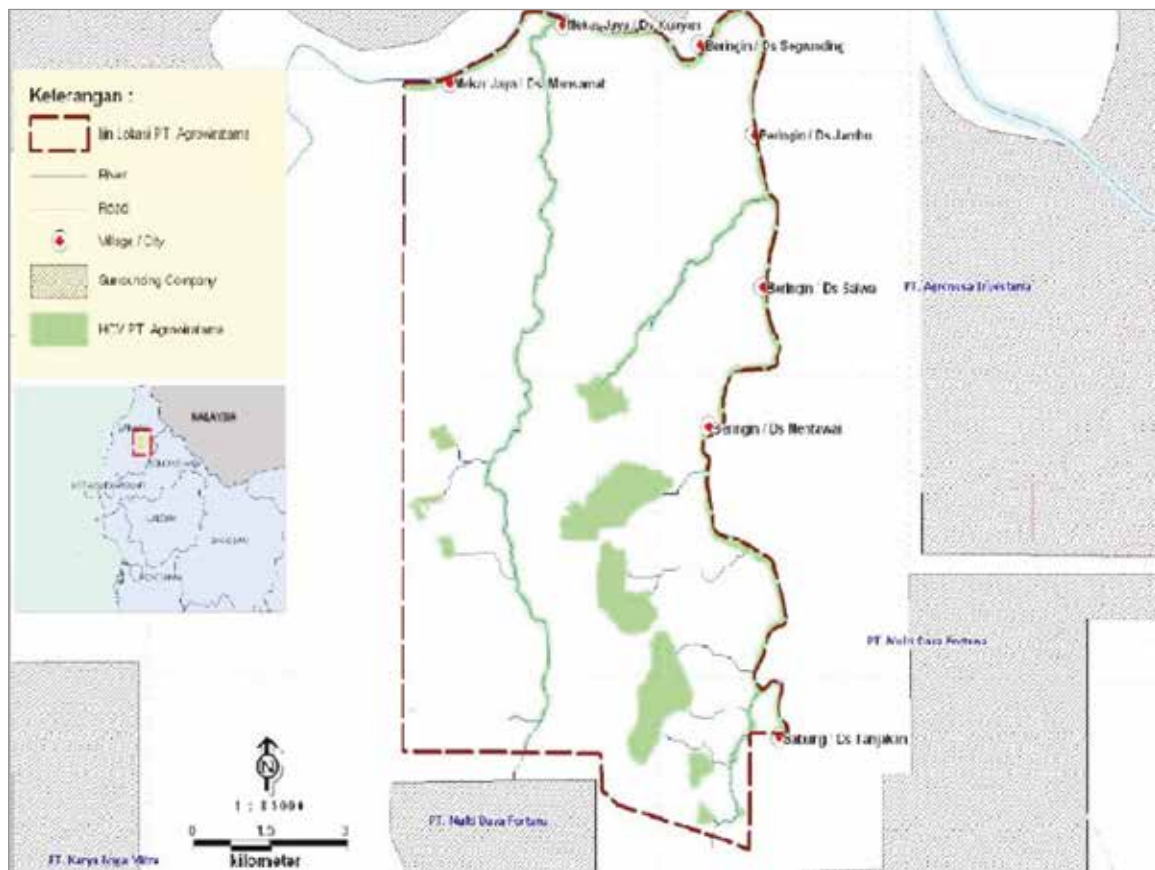
use the land (*hak guna usaha* - HGU) for oil palm actually issued by the National Land Bureau (BPN).

The NGO consortium got wholly contradictory accounts about the sequencing of planting and permits from the different government agencies. The National Land Agency insists that, according to the agency's regulations relating to land and plantations, companies cannot actually plant oil palm in their concession or build any installations until they have received a company land use permit or company building permit, although it admits that this often occurs. The companies however assume that they have the right to both clear and plant once they have secured an IUP. There is a glaring contradiction here. Indeed, in 2007, the district government issued a decree *requiring* that at least 20% of lands be planted for smallholdings *before* any HGU can be issued.¹¹ In effect, it seems to be impossible for companies to comply with both sets of laws.

Company in operation

PT Agrowiratama is a company of the Musim Mas group, an Indonesian business group owned by the Karim family. The activities of Musim Mas are centered on its core business of oil palm cultivation and palm oil processing. It is a market leader in the manufacturing of palm oil, soap and margarine and owns refineries, biodiesel and oleochemical factories, ships, tankers, a grain terminal and bulk tank terminals. In Indonesia, the Musim Mas Group ranks among the biggest producers in the vegetable oil refining and soap manufacturing industries.¹² The market share of the Musim Mas Group on the Indonesian palm oil refining market is about 25%.

The Musim Mas Group owns oil palm plantations in North Sumatra, West Sumatra, South Sumatra, Riau and Central Kalimantan with a total area of 122,572 ha. The company operates eight Crude Palm Oil (CPO) mills with a total annual



■ Map showing location of PT Agrowiratama's proposed new planting and neighbouring concessions (Source: Control Union 2011b:3)

line with decision letter of the Ministry of Agriculture and Forestry No. 259/KPTS-II/2000.

capacity of 660,000 tonnes.¹³ In 2007 Musim Mas opened its first biodiesel plant in Medan, which has an annual capacity of 200,000 tonnes. A second plant on Banka island, with an annual capacity of 350,000 tonnes, is under construction. Opening was planned for the first quarter of 2009.¹⁴ It is not clear if this last plant is in operation yet. The Musim Mas group has four estates in Sambas district: PT Agrowiratama 1 which was issued a location permit for 9,000 ha and was then issued a clearance permit for 6,880 ha, PT Agrowiratama 2 with a location permit for about 5,000 ha, PT Mulia Indah which now has a clearance permit for 8,000 ha and PT Musim Mas with a location permit for around 10,000 ha. The total potential area for Musim Mas' planned estates in the district is thus about 30,000 ha. The new planting area of PT Agrowiratama is located in Other Usage Area (*Areal Penggunaan Lain - APL*), in

Legal status of company operations

At the time of writing, PT Agrowiratama held the following permits and recommendations:

- Consent license/recommendation No. 582/76/BPMPPT-3/9th June 2009 on the location of PT Agrowiratama for 9,000 ha, issued by the Act of the Regent of Sambas sub-district (*bupati kabupaten Sambas*).
- Location permit (*izin lokasi*) No. 425/31st December 2009 for 9,000 ha, issued by the Act of the Regent of Sambas sub-district.
- Environmental Impact Analysis (AMDAL)/decree of *Komisi Penilai AMDAL* Sambas Sub-district Official Evaluation Committee No.269/12th October 2010, approved by the Head of the Environment Office (*Badan Lingkungan Hidup*) of Sambas sub-district.

- Plantation operational license (*izin usaha perkebunan*) No. 304/20th December 2010, approved by the Head of Sambas district, for 6,880 ha and a palm oil mill of 45 mt/hr capacity.

Further documents held include: principal permit (*izin prinsip*), land information (*informasi lahan*), forest land analysis (*telaah kawasan hutan BPKH*), forest land analysis from West Kalimantan Forestry Office (*telaah kawasan hutan Dishut Kalbar*), technical consideration (*pertimbangan teknis*), macro planning of the Governor (*rencana makro dari Gubernur*), AMDAL, Plantation Enterprise Permit (*izin usaha perkebunan/IUP*), Timber Utilisation Permit (*izin pemanfaatan kayu/IPK*) from the Forestry and Plantations Office of Sambas district (*Dishutbun*), a notary act, building construction permit (*izin mendirikan bangunan/IMB*), company registration code (*tanda daftar perusahaan*), trade business permit letter (*surat izin usaha perdagangan/SIUP*) and insurance (*Jamsostek*).

Land disputes

Two communities in the area have sustained opposition to oil palm for several years, even before the Musim Mas group began to invest in the area. The community of Tengguli is well known for its opposition but only a small number of villagers from Tengguli have farm lands within the PT Agrowiratama concession.¹⁵ The lands of the village of Mekar Jaya on the other hand fall right in the middle of the location permit that was granted to PT Agrowiratama. Mekar Jaya had also opposed earlier efforts by palm oil companies to develop the area including PT Borneo Palma Prima.

PT Agrowiratama secured its location permit in late 2009 and in April 2010, they invited various village leaders from Mekar Jaya, Beringin and Sabung and other local elites (see below) to visit PT Agrowiratama's operation in Pasaman Barat, West Sumatra. This was a first stage

in the company's *sosialisasi*¹⁶ programme. Almost immediately after this field visit, the community of Mekar Jaya carried out an informal plebiscite of villagers, found the majority opposed the palm oil development, and rallied outside the local regent's office on 20th May 2010 to publicly protest their inclusion in the concession without their agreement. On 23rd May 2010, they then submitted their concerns to the district legislature (DPR-D) which promised to look into the case. Consequently, in July 2010, the local government sent an investigation team to the area to look into the people's concerns.

In November 2010, the local government also sent teams to the area, accompanied by company observers, to review the unclear administrative boundaries between the villages. Although the government officials that we interviewed unanimously argued that determining such boundaries should be done by field surveys which determine the extent of village farmlands and other uses of the land, in this case the boundaries were not drawn with reference to farmlands. To the east of Mekar Jaya the boundary was merely drawn as a straight line with only one way point along its length. To the south, the boundary between Mekar Jaya and Sabung was also drawn using only three way points and not based on land use. Mekar Jaya residents claim that the rubber gardens, shifting cultivation plots and *belokar* lands of several dozen farmers were thereby unfairly allocated in Beringin as well as areas of community forests. This has led to their land claims in these areas being disputed and even those farmers with SPT have been told they are invalid as they were issued by the 'wrong' village.

The village of Mekar Jaya has faced a very different challenge in securing its land to the west of the Sekuan river. In early 2010, not long after PT Agrowiratama had secured its location permit, the Panji Anom family (often referred to as *ahli waris* or 'special heirs'), an elite *Melayu*

family with ancestral links to Sultan of Sambas informed the company that it was the owner of these lands. It based its claim on an 1897 letter from the Sultan, written in Malay Arabic, which endowed the family with land that allegedly overlaps PT Agrowiratama's concession. A further letter carrying the Sultan's signature, dated 1905, gave further details about the endowment.¹⁷ Representatives of the family were thus included in PT Agrowiratama's *sosialisasi* field trip to West Sumatra, were favourably impressed and agreed to reach a settlement with the company.

In December 2010, the local government issued a land clearance permit (IUP) to PT Agrowiratama which excised about 1,478 ha of Mekar Jaya's farmlands from the concession. Notably, however, to the east and south the excised area followed the newly defined village borders with Beringin and Sabung thus leaving some 350 to 400 ha of lands claimed by Mekar Jaya within the concession. Moreover, to the west of the Sekuan river a further 1000 ha of lands claimed by Mekar Jaya were included in the IUP, being the lands also claimed by the Panji Anom family.

These new determinations of the concession boundaries were not made public. When in January 2011, PT Agrowiratama filed information on the RSPO website under the New Plantings Procedure the maps released by Control Union showed the old boundaries of the location permit not the new boundaries of the IUP. So, when, following the NPP announcement, further concerns were raised with PT Agrowiratama by NGOs and the Mekar Jaya communities, these were based on this out of date information.

Under pressure from villagers, in February 2010, the Panji Anom family issued a public statement re-asserting their claim, acknowledging they had entered into a partnership (*kemitraan*) with the company but accepting that they would respect the rights of those using their lands who had

rubber seedlings of more than four years old. The offer was and still is rejected by Mekar Jaya which also disputes the validity of the Panji Anom family's claim noting that the family has never cultivated these lands and never consulted with the community prior to PT Agrowiratama gaining a concession in the area. In November 2011, following a further negotiation between Mekar Jaya and the family a handwritten letter was agreed and co-signed by which the Panji Anom family apparently recognises the villagers' right to all their rubber plantings and *belokar* lands. Neither of these agreements between the Panji Anom family and Mekar Jaya have been formally endorsed by the company. The company however confirms that since May 2011 it has been paying compensation in stages to the Panji Anom family.

Meanwhile, sustained opposition by the Mekar Jaya villagers to PT Agrowiratama's operations led to further discussions with the government which in March 2011 released the map of the IUP. This was at first seen as a victory by the villagers and NGOs and it only became clear later that the lands that had been 'enclaved' (or rather excised) not only did not include their lands east and south of the new village boundaries thus leaving them inside the concession but also gave into the IUP all the lands west of the Sekuan claimed by the Panji Anom family.¹⁸

At the time of the NGO consortium's field visit all these land disputes remained unresolved. Furthermore the NGOs took detailed testimony from several farmers in Mekar Jaya who complained that within the last four months, PT Agrowiratama has begun clearing their lands to the west of the Sekuan river without their consent or agreement. They allege that some 200 ha had so far been cleared including small areas planted by villagers with oil palm, extensive areas of rubber in various stages of growth, and *belokar* areas. Some of the farmers have SPT for these areas, some not. Some have filed their complaints with the village administration, some with the company and some are still to do so. In some cases farmers have been offered

compensation for the lands taken but these offers have been rejected. Noted one farmer ‘I don’t want compensation for the land, I want to work the land’. ‘I want my land back and they should replace the trees. I also claim lost income from the 10 years growth, they were near being productive’ noted another. ‘It is like they stole my land’ stated a third. A number of complainants who have rejected compensation and asked for their lands back have been told by the company to take their concerns to the Panji Anom family. As one village elder told us ‘the company is using these original heirs as their shield.’

It is notable that the company, local elites and even independent assessors all refer to those opposing the oil palm companies’ plans as ‘provocateurs’, rather than accepting that the communities have a right to organise and express their choices in line with their right to Free, Prior and Informed Consent.

Legal analysis of the Panji Anom heirs land claim

In an interview with members of the Panji Anom family and their lawyer, it was explained that at the time of the Sambas Sultanate, land ownership by the Melayu people required a process in which the applicant filed a supplication to the village head (*kepala kampung* or *pembekal*), which the village head then transmitted to a high official (*petinggi*), who in turn forwarded the request to the assistant of the *demang*, or district head, to be passed on to the *demang* himself. The *demang* then submitted the supplication to the prince (*pangeran*) who managed the riches and lands of the sultanate.

According to the Panji Anom family, the land they are claiming is theirs as an endowment (*karunia*) from the Sultan of Sambas pursuant to an endowment letter and a will dated 27th *rajab* (7th month of the Islamic calendar) 1314 H (ie 1st January 1897) in the name of Prince Moeda Natakoesuma bin Sultan Aboebakar

Tajoedin bin Pangeran Panji Anom Cakra Negara. This endowment letter became the basis for supplication for the affirmation of customary owned lands to be converted pursuant to conversion provisions in articles on Conversion Provisions [sic] and article IX of Conversion Provisions of the Basic Agrarian Law (Law No. 5/1960, L.N. 1960 – 104). The supplication was filed with a Letter of Supplication for Affirmation of *Tanah Milik Adat* dated 2nd February 1987 09/CNPA/I/1987 by Yayasan Cakra Negara Panji Anom. The West Kalimantan Agrarian Directorate responded to the conversion supplication through Letter Number 593.2/2699/Agr-87 dated 15th July 1987 as follows:

- a. The Sultan of Sambas was at the time of the will, head of the government of the people of Sambas, and their *adat* sovereign, holding the right to give land to any citizen. This is the basis for the granting of land by the Sultan to the Panji Anom Prince, which is valid and pursuant to Islamic law, bequeathed to his heirs.
- b. Based on the Decree of the Minister of Home Affairs No. Sk. 26/DDA/1970 regarding the Conversion Affirmation of the Registration of Former Indonesian Rights to Land, the endowment letter of the Sultan of Sambas to Pangeran Cakra Negara Panji Anom can serve as the basis for these rights to be converted to land rights pursuant to the Basic Agrarian Law.
- c. The conversion process can be done selectively, considering: provisions on maximum ownership limit pursuant to Law No. 56 Prp of 1960; provisions regarding absentee lands (Government Regulation No. 224 of 1961) and; third party possession of such lands.

In the case of the land claimed by the heirs to Pangeran Cakra Negara Panji Anom, the government indirectly afforded recognition of the legality of their claim, but fell short of issuing an administrative state decision that recognised the full and complete legal force of the heirs’ possession of the land, noting

that a conversion process was necessary, due consideration for third parties involved, and absentee lands.

The communities who are in possession of the land overlapping the Panji Anom heirs' land hold SPT with clear delineation of the lands in question and acknowledged by the village head (*kepala desa*). However, and like the Panji Anom heirs, the communities do not have a state administrative decision in the form of a land certificate that would lead to legal effect for them. Nevertheless, the physical possession and use of the land by the communities is relevant to the Basic Agrarian Law (Art 10 Para 1) which states that:

Any person or legal entity having rights over agricultural lands are required in principle to actively work or exploit the land themselves, by preventing extortionary means. This article mandates that the final decision about the right to land shall be given only to those who are really in possession of the land.

■ *Letter dated 1905 allegedly from the Sultan of Sambas, written in Malay Arabic, and endowing the Panji Anom family with land that overlaps with PT Agrowiratama's concession.*



According to the company, the validity of the communities' claims is proven by the signature of the village head on their SPT, but this has little legal weight. However, in line with Art 10 cited above, it is the village head who can testify as to the active and ongoing physical use of the land itself by the local communities, as a form of evidence to back their claim. The Panji Anom heirs claimed to have managed the lands and planted them with rubber and rattan up until the Japanese occupation, when rubber was replaced with banana crops. The communities, on the other hand, reported never having heard of the Panji Anom heirs prior to this present claim, and no evidence was found on the land in question of agricultural activity by the Panji Anom heirs.

Further complicating the picture, PT Agrowiratama conducted land clearing activities on the lands subject to overlapping claims *before* ascertaining with full certainty *who* owns the land and who uses it. The failure to clarify this has led to further ambiguity over, for example, who has the right to compensation, particularly as the company has already paid a certain amount of compensation to the Panji Anom heirs.

Community views on the process of respecting the right to FPIC

Mekar Jaya

The original village of Mekar Jaya was located at the nearby Mensamat, and prior to that in Kuayan. The community then divided and regrouped as Mekar Jaya, a village composed of three hamlets (*dusun*): Mensamat, Kuayan and Bantilan. The population of the village is around 3,000, most of whom are ethnic *Melayu*, and 29 of whom are Buddhist Chinese (with one Christian Chinese). It is recalled by some community members that among the first to open lands at Kuayan was a couple, one of whom was Chinese. Families stated with assurance that they are already the fourth

generation to have lived here, meaning that they have been there since at least 1870.

The interviews in Mekar Jaya revealed that while all (male community members at least) were aware of the existence of PT Agrowiratama, far fewer had heard of the RSPO or of the FPIC process which PT Agrowiratama has committed to implement as an RSPO member. Some community members stated that while the problems they were facing as a result of the company's presence could not be considered as serious, there were still a number of residual issues that remained unresolved, including contested and overlapping land claims and general lack of clarity among community members over the legal validity of different actors' claims to the land.

According to Pak Udin of Mensamat hamlet, only two out of 1,000 community members accepted PT Agrowiratama in 2009, when the regional government (PEMDA) issued its location permit to the company (25th Dec 2009), as evidenced by a collective petition against the company. Prior to PT Agrowiratama, Mekar Jaya had already rejecting several oil palm companies, including PT and PT BPP. On 20th May 2010, protests by community members took place in Semayong, where communities also rejected PT Agrowiratama's investment on their lands. Over 400 people took part in this protest in front of the office of the Sambas *bupati*. On 23rd May, Mekar Jaya submitted its statement of refusal to PEMDA.

The government Task Force looked into the Mekar Jaya issue in July 2010 and boundaries with Beringin were redrawn in November 2010 (without using the SPT register and only using three survey points). In December 2010, PT Agrowiratama's IUP was issued. The new boundaries led to half of Mekar Jaya's lands being excised and the east boundary of their village area (*wilayah desa*) becoming part of Beringin. One initiative taken by the company to 'socialise' their project was a 'comparative study' (*studi banding*) held in Padang, to

which the village heads of Tenguli, Beringin and Mekar Jaya were invited in 2010. It was reported that no other community members were informed or invited to participate in this meeting.

The former village head of Mekar Jaya, Pak Azim, describes the comparative study as follows:

When I went there, there were government representatives, company representatives, the police and members of the *ahli waris* (descendants of the Sultan of Sambas) too. We were told that if we were not willing to sign an agreement based on the Decree on Plasma Farming of the Ministry of Forestry, there was no point attending the meeting. So what was the point of the meeting? To make us sign a document? It was like a setup from the beginning.

On the other hand, it also appears that the content and outcomes of this study were not fully shared by the village heads with their respective communities. Pak Udin states:

We were not really told what happened in the meeting. Our village head told us about the benefits of oil palm plantations for local communities somewhere in East Sumatra, such as schools, hospitals, sports facilities, and so on. Why did the chief not socialise this project more with us? Probably because he knew we would reject it. They didn't mention any possible jobs in the plantation, but they did mention plasma. They were trying to coax us and make us want the plantation.

Thus while the village heads are chosen by the communities themselves to represent them, the information shared by these representatives with the communities was limited, as was wider community participation in the comparative study itself. The fact that the enclaved land is not only smaller but also excludes certain villages has led some community members to express doubts over the way in which their chiefs have represented their views and needs:

The land we have obtained in the enclave is smaller than we want. It does not match our

expectations. Is there a deal going on with the company here? We don't know enough (*kami kurang tahu*).

Interviews in Mekar Jaya also revealed that community members have not been given copies of relevant documents, such as a participatory map done in 2010 with the company and community representatives, even though they were involved in the mapping. The village head has a copy of the AMDAL (Environmental Impact Analysis) and people were consulted during the AMDAL in 2010. Community members reported having seen maps of the concession, the enclave and the High Conservation Value (HCV) assessment, but not the participatory map, and none were aware that they were entitled to ownership of the map by virtue of its participatory nature. It appears that a map of the enclave was given to them only in 2011. While an HCV assessment was carried out by consultancy company Aksenta, and

some community members were aware of this assessment, most had a limited understanding of what HCVs are. Pak Udin states:

I've heard the term 'HCV', but I don't really understand what HCVs are. The consultants and the Public Relations Officer of PT Agrowiratama told us they had something to do with protected species, endangered species, watersheds. We understood it was about protecting the animals living around our land and rivers.

Interviewer: What about protecting humans?

Pak Udin: Humans? Well, they just have to protect themselves.

Community members did not appear to know that HCVs also included areas fundamental to meeting basic needs of local communities (eg subsistence, health – HCV5) and areas critical to local communities' traditional cultural identity (areas of cultural, ecological, economic or religious significance identified in cooperation with such local communities – HCV6).

■ *Community meeting in Mekar Jaya / Marcus Colchester*



When asked what they considered most worth protecting, community members referred to their rubber plantations, rice paddies and riverbanks:

What needs to be protected are our rubber trees, riverbanks and fields. These are worth protecting because they are what the communities use and need. (Pak Udin)

Community members also reported that they had not been involved in the HCVA (High Conservation Value Assessment), nor was their consent sought prior to the assessment. They were unclear how had participated in the assessment, and only knew of the existence of HCVs on their land from signboards on trees and by the riverbank once the assessment was completed. When asked if they knew what kind of HCVs were on their lands, they responded that the signboards did not specify this. Finally, community members reported not having been given a copy of the HCVA. While an AMDAL was undertaken by PEMDA, community members reported not having seen or being given a copy of the document, although it was also reported that the village head has a copy. Some community members appeared to be unaware of the social dimension of the assessment, apparently not having been involved or consulted in the process.

When asked why copies of documents such as the AMDAL and HCVA were not provided to the communities by the company, representatives of PT Agrowiratama explained that communities are not interested in the documents and 'prefer to discuss and ask questions'. However, this was contested by former village head of Mekar Jaya, Pak Azim:

The company didn't offer to provide us with copies of these documents. We local communities may not understand everything about AMDAL and HCVs, but we should at least be given a copy, or at least a copy should be given to the village government, if not the community itself.

Furthermore, community members reported serious problems caused by lack of defined and participatorily mapped boundaries for both the enclaved territory and the boundaries redrawn between Mekar Jaya and Beringin in a later agreement between the village head and the *ahli waris*. The location and extent of the enclave was reportedly decided by PEMDA, without the involvement of the company.

Communities were unclear as to why the enclave is located where it is, as they were not involved in this decision-making process. Overlaps between land claimed by local communities, the *ahli waris* (descendants of the Sultan of Sambas) and the company are reported by community members as the major cause of concern. The enclaved land as demarcated by PEMDA excludes a number of villages and 200 ha overlap with land claimed by the *ahli waris*, who claim the legitimacy of their right to around 10,000 ha of land in Mekar Jaya, Sabung and Lubuk Dagang. Pak Azim, head of Mensamat hamlet (*kepala dusun*), states:

We also claim the *blokar*. We don't know if Raden Farid's letter is legally valid – this is the problem. We need help to find this out, but we do not understand the court system, and we are afraid to use it as a result. We are also afraid that their claim is legally valid, in which case ours will have little weight. We don't understand our legal rights. But we do know what the borders and extent of our village territory (*wilayah desa*) are from our ancestors, our elders, and so we know that the borders of today do not fit with those of our ancestors. But what our ancestors told us has no legal power – we know them from the oral stories passed down to us. We have lived on this land for over a hundred years at least. There are graveyards to prove this, that may be over 200 years old. Yet the claim to this land by the *ahli waris* is completely new to us.

Some community members were aware that the Basic Agrarian Law 1960 recognises claims to land based on ancestorship and history of land use:

We understand that under this law, both the communities and the *ahli waris* have reason to claim the land. But why are the claims from the *ahli waris* only being expressed now? They could have done this back in the 60s or 70s, but they happen to claim the land just when the oil palm arrives here.

Interestingly, the communities are paying taxes on the contested land, which the *ahli waris* are not:

We are both claiming the same land, but only the communities are paying taxes on it, and not the *ahli waris*. Doesn't that mean that we have legal rights to this land, and not them?

Community members of Desa Mekar Jaya met with the neighbouring villages of Beringin and Sabung, and with representatives of the *ahli waris*, to negotiate the boundaries in a meeting facilitated by PT Agrowiratama and PEMDA, but the boundaries still did not fit with those defined by their ancestors. In fact, after these negotiations, borders were redrawn between Beringin and Mekar Jaya to accommodate the land claims of the *ahli waris* which have exacerbated problems by causing parts of Desa Mekar Jaya land to become part of Desa Beringin. A reported five to seven people from Mekar Jaya who found part or all of their land within Desa Beringin have now conceded their land to PT Agrowiratama:

This enclave has caused even more problems. No consideration was given to the location of the borders. As a result, the boundaries of the villages have been shifted. Even the boundaries of sub-districts have been shifted. The enclave has cut up our village.

Some community members do not see the *ahli waris*' claim and the arrival of PT Agrowiratama as mere coincidence:

We had never heard about any claims from the *ahli waris* before PT Agrowiratama arrived. Did the company bring in the *ahli waris*? Were they brought into the picture to cause horizontal conflict among and within the communities? Maybe, but it is difficult to prove¹⁹

Despite the ongoing land conflict, PT Agrowiratama has reportedly already cleared at least 100 ha of the land under contestation, according to community members, but have agreed with the *ahli waris* and the community to leave the rubber plantations untouched and only to clear forest land.²⁰

Communities were also concerned as to how they could be sure that the enclaved land was secured. While it was reported that a written agreement witnessed by the Public Relations Manager of PT Agrowiratama did exist, stating that the company would not touch the communities' rubber plantations, the legal validity of this document was questioned by some community members:

We know this letter exists but we haven't seen it. We have the land now, but how can we be sure that it will not be taken from us again? What guarantees that to us?²¹

We don't agree with the cut-off [boundaries of the enclave]. We just refuse the company. We reject the oil palm – they can just move on. In the field, everything looks safe for now. But we are little people (*orang kecil*), we are people in difficulty (*orang susah*) – how will we face the bulldozers?

At present, the rights to land of community members in Desa Mekar Jaya appear far from secure. The assessment team was shown over 3,000 SPT (*surat pernyataan tanah* – land statement letter) owned by community members signed by their village chief, which constitute a form of evidence to register one's land with the BPN. However, there remains a lot of confusion among community members as to boundaries and the extent of overlapping claims. Community members reported that a map exists of SPT and *ahli waris*' claims to land, but have not seen it. In any case, Conflicting claims between communities and *ahli waris* are of utmost concern to the communities, who report never having heard of such claims prior to the arrival of PT Agrowiratama, and only hearing of them in 2010 during the comparative study,

which Raden Farid attended, along with company representatives. Pak Azim states:

It was only when the company came that the *ahli waris* began to lay claim to this land. Before that, we never even heard about them. We are the ones who cleared this land and planted it, not the *ahli waris*. We were also told by the company that they have already paid compensation to the *ahli waris* in exchange for their land. Everytime we ask for compensation, the company tells us that they have already paid it to the *ahli waris*, but we have no proof of this. It's like a game between them. We cannot flag for an off-side.

Both the company and the *ahli waris* are responsible for this land conflict. The company keeps using the *ahli waris*' claims as a shield. Their legal claims hinge on those of the *ahli waris*, although the legal status of the *ahli waris*' claims has yet to be clarified.

According to Raden Panji Anom, the lawyer of the *ahli waris* and other *ahli waris* family members, the process of clarifying the legal status of the land under conflicting claims is ongoing, and covers an area of around 8,900 ha.

At present, over 1,000 households in the enclaved territory have unresolved land claims, and a further 1,000 households outside the enclave and within the concession, according to community members. The communities of Mekar Jaya claim another 1,000 ha of land. According to them, the extent of their customary village territory (*wilayah desa*) is far greater than the

■ Copy of an SPT held by a community member of Mekar Jaya, signed by the village head in 2007.

SURAT PERNYATAAN

Yang bertanda tangan dibawah ini :

PERTAMA

1. Nama	: RIDWAN SUHAIRIN
2. Umur	: 26 Th
3. Kewarganegaraan	: Indonesia
4. Pekerjaan	: Tani
5. Alamat	: Dsn Kuayan 13/05, Mekar Jaya, Kec. Sajad

dengan ini menyatakan dan mengakui sebagai berikut :

- Kami telah menguasai / menggunakan / mengerjakan sebidang tanah negara
- Penguasaan tanah tersebut telah dilakukan berturut-turut sejak tahun 2007 hingga sekarang
- Tanah tersebut terletak di
RT / RW :
Desa / Dusun : Mekar Jaya / Bantilan
Kecamatan : Sajad
Kabupaten : Sambas
Propinsi : Kalimantan Barat
- Luas Tanah tersebut lebih kurang : 66,6 m x 300 m
- Batas – batasnya
a. sebelah utara ukuran : 66,6 M berbatasan dengan M. Yaspi
b. sebelah selatan ukuran : 66,6 M berbatasan dengan Rini
c. sebelah timur ukuran : 300 M berbatasan dengan Amwal
d. sebelah barat ukuran : 300 M berbatasan dengan Murni Nurhan
- Riwayat asal usul tanah tersebut adalah tanah milik negara




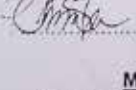
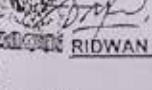
KEDUA

1. Nama	: Amwal
Umur	: 25 Th
Pekerjaan	: Swsta
Alamat	: Dsn Bantilan 10 / 03, Mekar Jaya, Kec. Sajad
2. Nama	: Murni Nurhan
Umur	: 43 Th
Pekerjaan	: Tani
Alamat	: Dsn Limus 5 / 3, Desa Jirak, Kec. Sajad


sebagai saksi – saksi yang mengetahui benar bahwa
==Saudara Ridwan Suhairin == (yang namanya tersebut diatas) telah menguasai sebidang tanah negara seperti diuraikan diatas sejak tahun 2007.
Demikian surat pernyataan ini kami buat dengan sebenar – benarnya dan jika di kemudian hari ternyata pernyataan ini tidak benar maka kami bersedia dituntut di muka hakim serta dicabut hak atas tanahnya tanpa ganti rugi.

Sajad, 14 Februari 2007
Yang Membuat Pernyataan

SAKSI – SAKSI

1. AMWAL			
2. MURNI NURHAN			

Mengetahui
KEPALA DESA MEKAR JAYA


AZIM KITUNG

stated 4,000 ha in the annual village profile compiled by PEMDA. The communities of Mekar Jaya and Beringin refused to join PT Agrowiratama, even though 20% of the total area was offered by the company as part of a *kemitraan* scheme. Pak Udin states:

With PT Agrowiratama, we would only get two ha per household, instead of the 10 ha we usually have. Even those of us who do plant oil palm do so privately and independently, along with rubber, which is more lucrative for us. Why would we want to be servants on our own land?

FPIC and women's participation – accounts from Mekar Jaya

In order to find out to what extent women in Mekar Jaya were aware of and involved in the FPIC process, informal interviews were carried out by female research team members with individual women and small groups of women.

These interviews revealed that the extent of knowledge of women in the village varies considerably. On the one hand, some had reportedly never heard of PT Agrowiratama, nor of the land conflict between their community and the *ahli waris*. None had heard about the RSPO or FPIC or been involved in any sort of community consultation with the company or the government:

I've never heard of PT Agrowiratama. I've heard of oil palm, but not about the company. (Ibu Resmiati)

Others were aware that there were problems, but did not want to be involved:

I don't want to hear about these conflicts. They make me feel sick and nauseous. I don't want my husband to tell me about them, even though I know there are conflicts. It makes me ill to think about them. (Ibu Karnia)

Customarily, the women do not participate in wider village meetings with the men (only one attended our village meeting, whose husband was working as a labourer in Malaysia). Furthermore, it appears that male family members do not share information about the issues discussed on these occasions (such as land conflicts) with them informally either.

Yet working the land is an integral part of most women's lives. Some spend over half of their day on their land:

I'm up at 1:30 am to go to the rubber fields. I come back at around 10 am, and at 1 pm, I go to the dry paddy fields (*ladang*) until around 6 pm.

A majority of the chores related to rice and rubber farming are carried out by both spouses together, such as general upkeeping, fertilising, clearing and burning. Women also make use of the forest to find vegetables and certain medicinal plants. However, women interviewed in Mekar Jaya appeared not to know the area of their fields and rubber plantations. Some of them reported that their SPT and land certificates were in the name of their husband only.

One woman interviewed, Ibu Resmiati, had reportedly lost 450 ha of her land due to the redrawing of boundaries in the negotiations with the *ahli waris* and PT Agrowiratama:

That land is now part of Beringin and outside the enclave, and it is all my rubber plantation. I am afraid to ask for compensation because I know that if I do that, the company will just take my land and prevent me from accessing it. I am dealing with all these problems because my husband is working as a labourer in Malaysia. He doesn't know about all of this, because it happened after he left. I won't tell him, because I don't want him to worry. I just want everything to be sorted before he comes home. He is quite a hot-tempered man (*dia sangat panas badan*).

Ibu Resmiati approached the chief of Beringin and the company about this:

I met with the chief of Beringin and asked him to return my land to me. He informed the company of my demand, and the company offered me compensation for it instead (*ganti rugi*). They offered me 1.5 million Rp. So I offered them the land for 3.5 billion Rp. Why? Because the land is worth so much more to us little people. If we want to plant oil palm, then we will, but we won't let someone else take our land to do it. If the company or the government helped us financially to start our own plantation, then we probably would. But who wants their land to be grabbed from them?

Because of the company, my land has shrunk. Before that, I got all my vegetables from the forest, peanuts too. I never bought husked rice (*beras*) before this year, because I had enough land to grow it.

For Ibu Resmiati, passing on the land to her children and grand-children is part of its intrinsic value:

The land will guarantee the livelihoods of my children, not money, because money is not enough. The land itself is the most secure source of livelihood. My hope is to pass on my ancestral land (*tanah kakak*) to my children, and to all following generations.

Beringin

Beringin is located in Kecamatan Sajad. It consists of four hamlets: Jambu, Segrunding, Salwa and Sarang Burung (Mentawai). Based on data obtained in the village office, there are 2,202 inhabitants (1,125 women and 1,077 men), and 570 families living in this village. Before the arrival of oil palm plantations, the people mostly worked as independent rubber farmers.

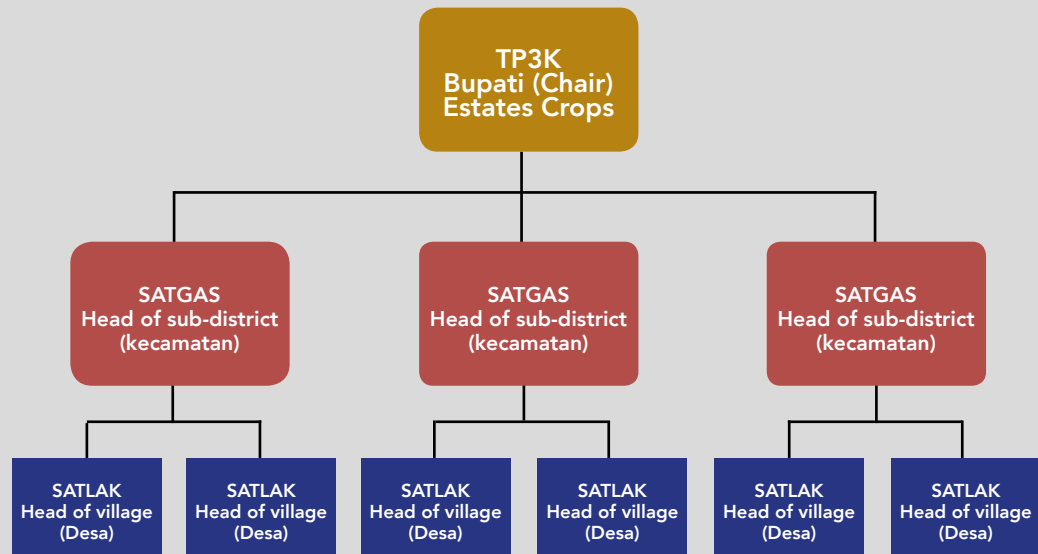
In Beringin, the investigation team interviewed the village head, Pak Asnadi, and the village secretary (*sekretaris desa*), Pak Kastani, at the village headquarters. Further interviews with community members more widely were not carried out due to time constraints. Overall, both interviewees described PT Agrowiratama's activities and process of *sosialisasi* with the community of Beringin as positive. Although they had not heard of the term FPIC or RSPO before, the process of interaction they described between the company and the community suggests that it was constructive and that the community expects to benefit from their presence. The main omission on the part of PT Agrowiratama seems to have been the sharing of key documents with the community, including AMDAL, HCVA and participatory maps.

According to Pak Asnadi, PT Agrowiratama engaged in an iterative socialisation process with the community, visiting each of the four hamlets prior to obtaining their location permit. Two meetings were held with members of Beringin in the local school, during which the benefits of cooperating with the company were explained and the company promised not to touch the rubber plantations of the community. Communications with the company were reportedly ongoing and the right of the communities relatively well recognised and respected:

They followed the rules properly, regarding the environment, the important needs of the community, their rubber plantations, and so some of us have agreed to cooperate and work with the company.

300 ha are owned by PT Agrowiratama in Beringin, of which 150 ha is collective village forest (*hutan desa kolektif*) and 150 ha plasma. 80% of the 300 ha will be allocated for nucleus and 20% for plasma. Pak Kestani reported that while the company had not provided monetary compensation for the land taken, it was supporting infrastructural development in the village, such as the building of roads through the forest and the provision of 90 bags of cement for construction works.

Proxies of representation



The District Level Plantation Monitoring and Supervision Team (TP3K) established at the district level is supported by the Sub-District Task Force (SATGAS) at the sub-district level and Village Task Force (SATLAK) at the village level. The executing team members of the TP3K comprise village heads, vice-director of the Village Development Board (*Wakil Ketua BPD*), heads of hamlet (*kepala dusun*), heads of neighbourhood units (*ketua RT*), community leaders, customary leaders, and community relations officers of PT Agrowiratama.

The functions and tasks of SATLAK described in the decision letter of 29th March 2011 are:

- To act as a [communication and coordination] bridge between the company and the community.
- To cooperate with the company in resolving land conflict or providing compensation if land problems emerge in the future.

- To work closely with the Company Team in the field to resolve and/or give directives in land measurement for land release/compensation.
- To cooperate with the company and the government in implementing community socialisation.
- To cooperate with the Cooperative and the government in planning *kemitraan*/plasma arrangements for the community through substantiation.
- To quickly resolve each land and social conflict which affects the development of the plantation, at the level of the SATLAK *desa* to prevent further aggravation. Should the conflict not be resolved at the level of the SATLAK *desa*, to bring up the case to the level of the *kecamatan* Task Force, headed by the *camat*, and should this fail, to bring the case up to the TP3K of Sambas district.

The village head of Beringin also described the establishment on 29th March 2011 of an implementation unit (*satuan pelaksana*) known as SATLAK in Desa Beringin, whose purpose is to monitor the activities of the company and raise complaints from communities to the company. One of their responsibilities is to communicate with communities and define the borders of community-used lands, such as gardens and rubber plantations. SATLAK in Beringin is headed by the village head and its members

include a senior representative of BPD, the heads of the four hamlets of Beringin, two community representatives and a public relations and surveying team from PT Agrowiratama.

The establishment of SATLAK was seen as a positive initiative on the part of PT Agrowiratama by the village head of Beringin:

When there is a problem, such as a border problem, the community can call on the village

head, who then brings the complaint to SATLAK. Its members are chosen by the community in meetings. SATLAK then goes into the field to verify the nature of the complaint, and then bring it up to PT Agrowiratama, and any other stakeholders involved.

The village head and village secretary had never heard of the term FPIC, but a description of the right and the due process involved led them to conclude that they believed an FPIC process had been implemented by PT Agrowiratama, and that the cooperation of some community members with the company was out of free will:

Some said yes, some said no. It was an open process. We were not forced. (Pak Asnadi)

Setangga hamlet, Sabung village

Sabung consists of two hamlets: Sabung Setangga and Sabung Sanggau. The population of Sabung is Dayak in the majority, with some migrants from Java and Malaysia. Interviews with community members of Sabung Setanga revealed a stark contrast in perspectives on PT Agrowiratama's interaction with the community and its activities, with some strongly supporting their relationship with the community and others denouncing a serious lack of consultation.²²

Interviews revealed a significant confusion among community members as to whether Sabung Setangga is located within the concession of PT Agrowiratama or PT Mulia Indah (one of the three neighbouring Musim Mas concessions). This suggests that genuinely comprehensive and participatory mapping has not been carried out to clarify this understanding. The terms of the *kemitraan* scheme to which some community members have agreed have not been clearly explained to them, in particular, the fact that plasma land will revert to State land upon the expiry of the Business Use Rights (HGU) and that their rights to this land will be terminated. Finally, a lack of documentation of agreements and decisions taken with the company was also demonstrated.

According to Pak Budi, whom we were later informed was a newcomer from Java to Sabung (since about one year), the relationship between Sabung and PT Agrowiratama was good and the community looked forward to benefiting from economic development from its presence. According to Pak Budi, PT Agrowiratama carried out four *sosialisasi* activities in Sabung Sanggau, but not in Sabung Setanga. During these activities, the company explained to the communities the terms and duration of the HGU and the nature and purpose of HCVs, and also promised (verbally) not to touch the rubber plantations of the community. The company reportedly respect the sacred sites and graves of the community, and have not caused any obstacles for communities to access these sites. Pak Feron, the manager of the company, reportedly explained clearly and in person to the community the legality of the location permit and HGU. Furthermore, Pak Budi reported that PT Agrowiratama employed a number of women from the village and had set up a child care system for them as well.

However, the views expressed by Pak Budi were strongly contradicted by the new village head of Sabung, Pak Jeksen, whom the investigation team met later that day. The contrast between their perspectives was remarkable, prompting Pak Jeksen to call Pak Budi and demand an explanation for his comments over the phone on loudspeaker mode. Pak Budi claimed he had explained the positive and negative sides of the story to the investigation team, which was far from the case. Split allegiances between the two community members were further revealed when Pak Jeksen retorted by asking Pak Budi how much he had been paid by Pak Peron (manager of PT Agrowiratama) and asking him to stop lying about the situation of the community in Sabung.

According to Pak Jeksen, village head of Sabung since 2011, and a Dayak man, PT Agrowiratama obtained its location permit without having provided sufficient information to the community

of Sabung about its projected activities and their potential impacts, both social and environmental. Pak Jeksen claims never to have heard of the RSPO or FPIC, and repeatedly stated that PT Agrowiratama had not, or had not yet, carried out socialisation activities in Sabung Setangga, despite the fact that the office of the company is located close by (although he acknowledged that socialisation may have taken place in Sanggau and that relations between Sanggau and PT Agrowiratama were overall positive). Pak Jeksen states:

There has been no direct contact with the community of Setanga. Our permission was never requested. Pak Peron has never gone down to the field in person: we are still waiting for the company to come and socialise their project with us. As for socialisation, it consisted of the *studi banding*. That was the only socialisation. We don't really know what PT Agrowiratama is? What kind of system will they operate on? We have had no explanation of this. Agrowiratama is chaos (*Agro itu kacau*).

Pak Jeksen claims that no *kemitraan* scheme has been offered to community members of Setanggabut but perhaps to Sanggau. He was unaware of whether participatory mapping had been carried out in Sabung, and had never seen copies of the AMDAL. Pak Jeksen claims only to have met the HCVA research team after they had finished their assessment, at the Pantura Hotel, in Sambas. According to him, at least some of the HCVs identified are actually located on land that overlaps with PT MIS and are thus outside the location permit of PT Agrowiratama. As a result, he states that PT Agrowiratama has refused to pay compensation to the community for access and use of these areas because they are located outside their concession.

Pak Jeksen was adamant that the investigation team needed to visit the community itself to hear their views in person:

If you don't believe me, come to the village. Ask the people. Ask them about PT Agrowiratama,

about the system it consists of. They don't know anything. About the HGU, or anything else.

Of serious concern is the fact that community members who have accepted the plasma scheme offered by PT Agrowiratama appear to be unaware of the fact that their lands will revert to State land upon expiry of the HGU. They stated that the company had verbally agreed to this but that no contract had been made:

Our land will be returned to us and we can do whatever we want with it: plant it, make our gardens, sell it. If the land wasn't going to be returned to us once the HGU ends, of course we would not take this deal. (Pak Ali Darsono)

In addition, there is a discrepancy in the terms of the *kemitraan* scheme that members of Sabung have accepted. The socialisation report states that Sabung requests a 50/50 share in the scheme, whereas company representatives have explained the share will be of 80/20 in favour of the company.

Obstacles for communities in securing lands and exercising the right to FPIC

A number of obstacles were identified by community members to the securing of their lands and the exercise of their right to FPIC. First and foremost are the claims of the *ahli waris* to land they consider as theirs by virtue of historical occupation and use. Many community members were surprised that these claims were never voiced before the arrival of PT Agrowiratama, and remain unclear as to the legality of this claim.

Second, the boundaries of customary territories and claims from communities, the *ahli waris* and PT Agrowiratama appear to be far from clear. Former delimitations have been confused as a result of the delimitation of the enclave by PEMDA without consultation with the affected communities. In fact, community members state that establishing clear boundaries should have been done before their demonstration in May 2010:

Actually we should have clarified our boundaries before demonstrating against oil palm, because now they have cut off our lands.

Now that oil palm is here we need more clarity about who owns which land. (Pak Udin)

Third, the communities appear to lack sufficient information from the company and the government about the oil palm plantation to make informed decisions. Relevant documents have not been shared or given to them, such as the HCVA or the Environmental and Social Impact Assessment (ESIA), and socialisation activities by the company have been all but negligible. Where they have taken place, they have not sought to include wider community participation, leading to those being involved, the village chiefs, to be criticised by certain community members for the unsatisfactory outcomes of boundary and territory negotiations. The lack of transparency both between the company and the community, and to a certain degree, within the communities themselves, appears to have exacerbated uncertainties over land claims and rights.

Quite worryingly, the community is not aware that their land will revert to State land upon expiry of the HGU and most think that it will be returned to them to do as they wish with.²³ Furthermore, community members do not have a copy of their plasma scheme contract with the company, which the village head acknowledged was creating fear that PT Agrowiratama would end up taking over their lands.

While *sosialisasi* has taken place on a number of occasions, it appears these constitute negotiations over the terms of the relationship between PT Agrowiratama and the communities, rather than the genuine pursuit of consent. *Sosialisasi* is being equated with FPIC, but even then, is weak and perfunctory in practice. It is also evident that proxies are being used within villages to influence the decisions of other community members who may disagree with PT Agrowiratama's activities (Pak Budi being an example of this). The pursuit of individual consent and

not community consent is problematic, as the impacts of PT Agrowiratama's activities will not be experienced on an individual but a collective basis. The focus of the company's socialisation activities appear to be at the *desa* level and on certain influencible individuals.

Community representation also appears to be problematic: for example, some community members expressed doubts as to whether the members of SATLAK truly reflected the views of the community, or whether they have been influenced by the company in such a way that their function is not to seek the consent of communities, but to negotiate the terms of their relationship with PT Agrowiratama.

An insight that can be drawn from this is that homogeneity in views within the community should not be assumed: the relationship and personal allegiances of the individuals interviewed with the company has a strong bearing on their perspectives, and the difficulty in accessing the *dusun* itself suggests that certain actors from the community may have been seeking to avoid the investigation team from meeting with the broader community.

Overview of company's implementation of the right to FPIC

The NGO consortium interviewed representatives of PT Agrowiratama on 13th June 2012.²⁴ The representatives first explained the permit acquisition process of their operations. In 2009, land information (*informasi lahan*) was collected, followed by a participatory survey once the location permit had been obtained, and a field survey by consultant team Aksenta, who visited the villages within the area covered by the location permit. Technical recommendations were made by district authorities and the plantation business permit (*izin usaha perkebunan*) was issued to PT Agrowiratama. Once the plantation business permit had been obtained, the company carried out consultations in the affected villages and established SATLAK

at the village level to engage customary leaders and other village representatives. Notifications on the new planting were made in the villages for 30 days and consultations took place in the villages of Sabung, Beringin and Lubuk Dagang in Subah, Sajad and Sambas.

With regards to the local communities inhabiting the concession, the company representatives stated that while customary structures did exist in Sambas district, they were not as strong with regards to customary land (*tanah ulayat*) as in other parts of Indonesia, such as Padang in West Sumatra. They admitted that problems between the company and communities of varying scale persisted, but that through mediation and negotiation with customary leaders, these were being resolved.

According to company representatives, a social survey was conducted to identify local communities that lived in or near the area of proposed planting. Former gardens planted with fruit trees and crops (*tembawang*) were also identified in a land survey. The process of land acquisition was documented in the minutes of land measurement meetings (*berita acara pengukuran lahan*) (attended by SaATLAK) as well as customary tenure systems and customary land boundaries. Participatory mapping was included as part of the participatory survey in 2009. Company representatives noted that community members rarely held formal evidence of legal ownership of the land, apart from their SPT.

The company representatives stated that the membership of SATLAK was determined by a decision letter based on a village decree. SATLAK was understood by the company as evidence that they had accepted the self-chosen representatives of the communities. Company representatives assured the NGO consortium that compensation (cash) had been paid to the villages who had lost land to oil palm, and that these payment processes were fully documented. There is no MoU regarding rights-holders who

are entitled to compensation or benefits, but there are records of compensation payment recipients. The smallholder scheme (KKPA) is based on a plasma system held by a cooperative under the HGU. Plasma plots are not distributed to individuals. The company also reports holding records of land owners, but that customary land boundaries and locations are continually contested, as in the case of the *Ahli Waris*.

With regards to participatory SEIAs, the company reported having invited representatives from the affected villages to give their inputs to the assessments through focus group discussions and consultation meetings. According to the representatives, these meetings were participatory in nature, but did not necessarily delve into great detail into the issues raised. The HCVA of June 2010 involved visits by Aksenta to the communities, and the Aksenta team was reportedly accompanied by several community members. Only one public consultation was held on this occasion.

At the time, the company reportedly received 'investment support letters' (*surat dukungan investasi*) from three villages, which are very general statements rather than specific endorsements of the ESIA or HCVA. The company does not provide evidence to the communities of their participation in the mapping, SEIA or HCVA, and the communities do not ask for them, supposedly because 'they do not understand these things in writing'. However, should the communities request these documents, the company will provide them.

When asked whether there was evidence that neighbouring communities (ie those not directly involved) had endorsed the boundaries of land claims of affected groups, the company reported that mapping the boundaries between and with other villages were not their responsibility, and that the communities themselves should determine these. If any problems arose in this regard, they would need to be dealt

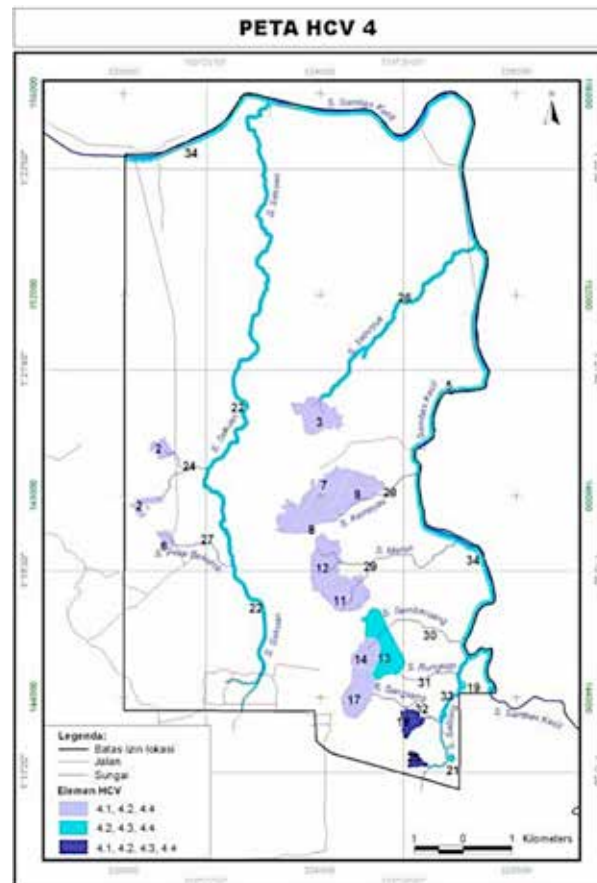
with through the external complaint SOP (Standard Operational Procedure) of the company.

With regards to negotiation procedures, the company has a SOP which guides the process of consultation and requires the documentation of this process. In addition to the SOPs, the company reports accepting as recognised evidence that which has been endorsed by the *desa* authority. Negotiation processes are organised and facilitated by TP3K as a proxy, and village representatives are actively involved. Community welfare is supported through the company's corporate social responsibility programme on 1) society, religion and culture 2) education 3) health 4) infrastructure and 5) economy, based on the needs and proposals from the communities. A conflict resolution mechanism has also been developed by the company.

HCV Assessment

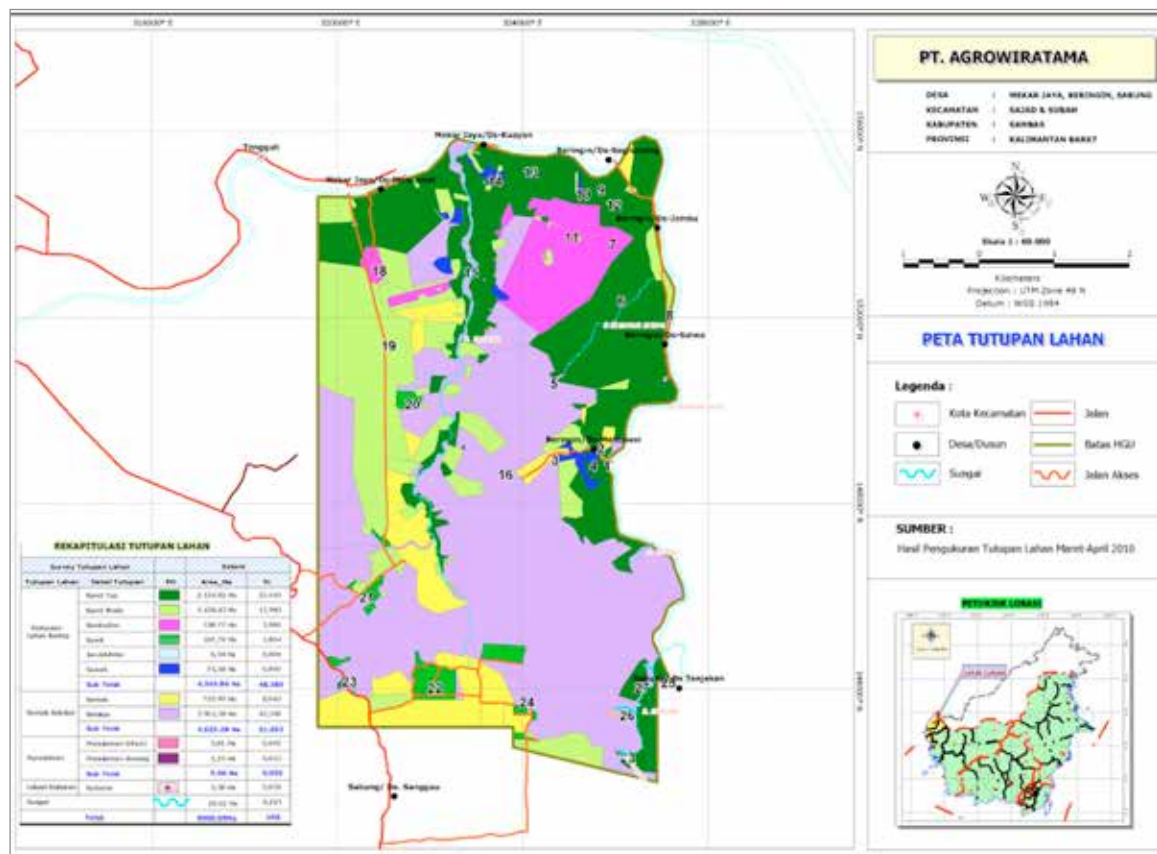
A detailed assessment of the High Conservation Values in the PT Agrowiratama concession was carried out in the field by the Indonesian consultancy, Aksenta, in June 2010, submitted to the company in June 2010, submitted to the company in August 2010 and then revised and finalised in November 2010.²⁵ The report was released to the NGO consortium team by PT Agrowiratama at the team's request, in compliance with the RSPO Principle 1 on Transparency.

No primary forest was found within the legal boundary of PT Agrowiratama in the HCV Assessment. Peat soil represented 3% of the soil within the concession. The HCV assessment identified areas that should be managed to conserve HCVs 1, 4 and 6, being, in sum, remnant forests harbouring rare, threatened and endangered species (1), river banks for protecting limnology and hydrology (4) and sites and graves sacred or culturally important to the residents (6). The total area of these HCVs is of 982.4 ha, or 10.9% of the total concession area. The Aksenta team developed a detailed map of the land use system within the concession.



■ Map of HCV 4 in PT Agrowiratama concession
(Source: Aksenta 2010:5.28)

The study concluded that the planting of palm oil would have a 'significant social impact on the basic requirement to the social sustainability of the local community'.²⁶ However, a surprising aspect of the assessment is that, notwithstanding this finding and the detailed livelihood mapping, it did not identify any areas as HCV 5, defined by the RSPO as 'areas fundamental to meeting the basic needs of local communities'. The assessors explain that they could not determine which areas are basic to the communities' livelihood as they could not determine in advance which lands the community might choose to relinquish to the company in the expectation of improved incomes and which they might choose to retain to sustain their current economies.²⁷ This suggests that the current methodology being used by these HCV assessors provides almost no protection of basic needs or food security.²⁸



■ *Map of land use in the concession (Source: Aksenta 2010)*

Recommendations from the communities

The community of Mekar Jaya have been struggling for two years to secure their rights to land. For them, a priority is to conduct repeated and participative mapping to identify, measure and demarcate land and land claims, as this was identified as a key cause of existing land conflicts with PT Agrowiratama and the *ahli waris*. Secondly, the community of Mekar Jaya expressed the critical need to clarify and ascertain the legal validity of the *ahli waris*' claim to their land, as this has also been a source of unprecedented overlapping claims. Should the *ahli waris*' claim be found null and void, the communities expressed their wish that all of Mekar Jaya be enclaved, including the land that is now outside the enclave due to the existing enclave boundaries. Thirdly, the community of Mekar Jaya wants the *blokar* lands returned to them and recognised by the company, the *ahli*

waris and the government, as their land. A number of those interviewed saw the resolution of these ongoing land conflicts as the responsibility of the company and the government jointly, either as facilitators or initiators. Finally, the return of land claimed by communities was expressed by many as an inherent right of the communities as their long-term users and owners:

Return our customary *adat* lands to us, because that is our right under *adat*. We don't want the money. Apart from the land, we don't want anything else (*tanah harus dikembalikan kepada masyarakat adat, karena itulah hak masyarakat adat. Nggak mau uang. Selebihnya, kami nggak mau*). (Ibu Resmiati)

The village head of Beringin described PT Agrowiratama's interaction with the community of Beringin so far in overall relatively positive terms. However, it appears that there remains a significant degree of insecurity over the certainty of agreements made verbally with the company, particularly in relation to land use, the kemitraan scheme, and the lack of

written documents made available to the community by PT Agrowiratama. It was also recommended that the monitoring and preservation of identified HCV sites in Beringin be the responsibility of the company, as the community lacks the capacity to do so itself.

Three recommendations were made by head of hamlet Sabung Setangga Pak Jeksen as key to securing the land rights and FPIC of the community of Sabung. First, socialisation activities are absolutely critical for *dusun* Setanga and the company must initiate these as soon as possible, to prevent conflict at a later stage. At present, a significant lack of knowledge and information has been communicated to its community. Second, it was recommended that PT Agrowiratama clarify the legal validity of the *ahli waris*' claim to land, and not to give it precedence over the claims of the communities who have been working it for generations. Finally, Pak Jeksen urged PT Agrowiratama to stop the clearing of the land until these land conflicts are fully and efficiently resolved in a way that is satisfactory to all parties involved:

I don't know if PT Agrowiratama has an HGU, but I do know that they are already working the land. Yet we reject PT Agrowiratama. They are operating illegally, and without socialising with the community here. The situation bears great potential for conflict.

Recommendations from the government

- Provision of greater funds to the district government of Sambas in order to carry out adequate and comprehensive monitoring and evaluation of oil palm company operations, including processes of negotiation and consultation with local communities and resolution of land disputes and other grievances.
- PT Agrowiratama to submit its 3-monthly report as part of its HGU application requirements.
- PT Agrowiratama to ensure that the enclaved land is clean and clear, meaning that conflicting claims are resolved in ways that are satisfactory to all parties involved.
- PT Agrowiratama to clarify *who* exactly are the members of the Panji Anom family who are laying claim to the land on the basis of inheritance.
- PT Agrowiratama, local communities and the Panji Anom family to work towards a possible compromise in the form of a limit on the size of land ownership to 20 ha per Panji Anom family member involved. To this end, communities should come to a collective agreement on such a 'land ceiling' and develop a regulation at the village level. This new regulation could then be put forward to relevant authorities at the sub-district and district levels, to be endorsed and supported by the district government and registered with the National Land Agency.
- Greater weight given to the active and sustained *use* of land as the legitimate basis of land claims, and revision of the boundaries of the enclave should the current boundaries not reflect fully local communities' use of the land.
- Recognition of and protection of HCV 5s through the development of mechanisms for joint monitoring and management by the company and the communities, and possibly endorsed by a local regulation.
- Incorporation of HCV 5s in the spatial planning laws of Sambas and in local regulations relating to community land and food protection (*perlindungan lahan pangan masyarakat*).
- Information on HCVs to be shared with local communities, including the results of HCV surveys and the location and boundaries of HCVs.
- PT Agrowiratama to provide awareness-raising activities and training to local communities on the nature and value of HCVs so as to better protect and maintain the biodiversity of these areas whilst allowing communities to continue their customary agricultural practises within them.
- PT Agrowiratama to provide copies

of their HCV Assessment to relevant government bodies (National Land Agency, Board of Investment and Forestry and Plantations Office)

Recommendations from the company

- Local government to act as a bridge when disputes arise between companies and local communities.
- NGOs to work together with companies to deliver information to shape communities' understanding of the company's operations and its impacts (both negative and positive).
- Government to work on improving transparency and information-sharing to companies and local communities in relation to development programmes and policies.

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Endnotes

1. The New Plantings Procedure was adopted in 2010 and requires RSPO members to post information on the RSPO website about their plans to open up new plantations, along with a summary of how they have done their High Conservation Value Assessment (HCVA), impact studies and the process they are using to secure lands. Under the procedure companies must allow 30 days to

receive comments on their plans and they must delay planting if complainants have evidence that they are in violation of RSPO requirements under Principle 7 on 'new plantings'. The purpose of the procedure is to ensure that companies start off on the right track and do not clear primary forests or areas with High Conservation Value (HCV), or take over lands without consent, thus disqualifying the operation from certification later. Under the RSPO certification system if a company is in violation of these key provisions or has serious conflicts in its operations then not only may it not be certified but all other operations of the same conglomerate are also disqualified.

2. RSPO 2011.
3. FPP, Sawit Watch, Gemawan & Kontak Rakyat Borneo 2011.
4. Summit Reports (nd).
5. Hadisuparto 1996.
6. Siregar & Sambas 1999:153.
7. Carlson et al. 2012.
8. The term *Malayo* is first recorded in a Chinese text as applying to a Hindu kingdom in Jambi in the 7th century CE. *Melayu* is still the name of a river there. The term was gradually applied to other eastern Sumatran kingdoms over the following centuries being extended to include Melaka when the political centre of gravity shifted across the Malacca Straits. The term also began to be applied to the language of commerce of the archipelago and from the 19th century, as notions of race took hold, both colonials and locals began to apply the term to refer to almost all the Islamic subjects of the coastal trading entrepot states (Milner 2008). In Sambas today, many of the Malay-speaking Islamic lowland and riverine communities which, however vaguely, trace allegiance back to the Malay Sultanates, describe themselves as *Melayu* even if many of them are relatively recent converts to Islam and their ways of life retain many elements of their Dayak past.
9. The HCV Assessment notes the prevalence of 'illegal logging' in the area (Aksenta 2010), although the area is classified as APL and not forest land.
10. One interviewee noted: 'we don't apply *adat* to land, that is for the Dayak. We only have *adat* for ceremonies like marriage and funerals.
11. Regulation 26/Permentan/OT.140/2/2007.
12. Musim Mas Group 2006.
13. Tan 2007.
14. Sambodo 2009.
15. Aksenta 2010.
16. The term *sosialisasi* which has the normal meaning of 'being friendly' is used as a technical term by Indonesian developers to mean 'awareness raising' or 'public dissemination of information'. It implies a one way transfer of information from the developer to those to be developed. See '*sosialisasi*' in Glossary.
17. Although we met with the Legal Attorney for the Panji Anom family, we were not shown the original versions of these letters only photocopies and so we make no comment here on their authenticity or otherwise. It is however important to note that the Panji Anom family is known to have been socially excluded by other descendants of the Sultan and an alternative version of the 1897 letter is also in circulation which endows the same lands to other heirs, so the issue of authenticity needs determination.
18. Forest Peoples Programme et al. 2011.
19. Similar cases of land claims based on letters from the Sultan of Sambas have also been reported in the case of neighbouring oil palm plantation PT ANI in its dispute with *desa* Sajingan Kecil and in PT ANI's extension in relation to Sabung. We also heard from our discussions that the community of Tengguli had been able to repudiate their claims and fend off palm oil from their lands.
20. This is despite the fact that the company acknowledges that concession and enclave borders are still in the process of being clarified and that conflicting land claims still exist. Discontent within the community about the clearing has already resulted in one community member (Aswandi) destroying oil palm seedlings of PT Agrowiratama. After being reported to the police, his case was retracted.
21. Company representatives stated that their priority was to clear empty lands first and not rubber plantations owned by communities, but did acknowledge that as many of them practise shifting cultivation, it is difficult to determine what 'empty land' consists of without first identifying and consulting the land owners.
22. It should be noted that the investigation team was unable to enter the hamlet itself during visits on two consecutive days, as community members interviewed either asked to meet outside the hamlet in coffee stalls by the road, or met the team on their way to the hamlet.
23. Company representatives, on the contrary, stated that the communities knew they would lose their land and that they were happy with that ('they only think about today, not about tomorrow').
24. PT Agrowiratama staff interviewed: Sahat Mikal Indra Siregar, Erwin Hutagaol, Riko Pratama Putra, Hasto Trijatmiko (Sustainability Department), Santo Limbong (Field Manager), Susanto (Public Relations) and Kanda (Certification)
25. Aksenta 2010.
26. Control Union 2011a: 9.
27. Aksenta 2010a: section 6.2.
28. That this is systemic can be seen by comparing the PT Agrowiratama HCV Assessment with that carried out by Aksenta for PT Mulia Indah, another Musim Mas company, in 2011 (see Control Union 2011b). Again Aksenta identified no HCV 5.

2 PT Surya Sawit Sejati and the Waringin people of Kotawaringin Barat, Central Kalimantan

Asep Y. Firdaus, Y.L. Franky, Fatilda Hasibuan and Edy Subahani with Andi Kiki

Company profile

On 14th December 2004, CV Surya Sawit Sejati (CV SSS) changed its status from Limited Partnership (*Comanditaire Vennootschap/CV*) engaged in the business of procurement¹ to Limited Liability Company (PT SSS) engaged in the business of selling fertilisers, seeds and farming equipment.² In 2006, PT SSS became an oil palm plantation company³ with a reported concession area of 15,550 ha.⁴ The permits held by CV/PT SSS are listed in Appendix I.

On 25th April 2006, Malaysia-based company United Plantation Berhad (UP) made public its acquisition of PT SSS. However, the statement was deemed one-sided on the grounds that UP had not carried out any prior legal process

in the acquisition of this concession. The acquisition of PT SSS was effective after the Investment Coordinating Board (BKPM) approved the sale of PT SSS's shares to Bernam Advisory Services Sdn.Bhd. (BAS), a subsidiary of UP, on 8th January 2007.⁵ The approval also marked the change of status of the company from a domestic company (*Penanaman Modal Dalam Negara/PMDN*) to a foreign investment company (*Penanaman Modal Asing/PMA*).

On 19th January 2007, PT SSS amended its Articles of Association regarding the sale of shares, the formation of shareholders and the formation of the board of directors and commissioners, with BAS/UP holding the majority of shares (95%).⁶ The remaining 5% are owned by two individuals, Suryadi and Soedjai Kartasasmita.⁷ BAS/UP staff are also part of the company's board of directors and commissioners. Based on a statement in PT SSS's

■ PT SSS oil palm plantation / POKKER SHK collection



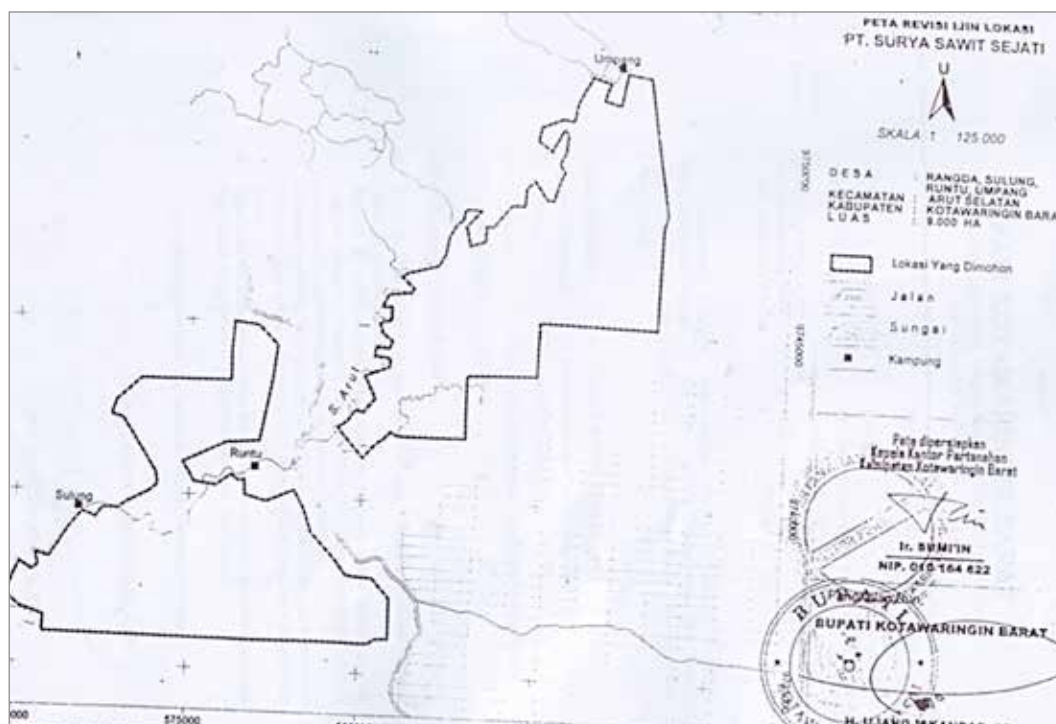
Profile of PT SSS ⁸	
Name of company	PT Surya Sawit Sejati
Name of company group	United Plantation
Headquarters	Sungai Rangit Jaya SP.6 Village, Pangkalan Lada Sub-district, Pangkalan Bun, 74101, Central Kalimantan
Address of the representative office in Indonesia	Wisma Nugraha Santana, 16 th floor, Jl. Jendral Sudirman Kav. 7-8 Jakarta 10220
Total area of plantation	15,550 ha divided into: - Nucleus (<i>Inti</i>) estates: 8,902.92 ha - Plasma estates: 107 ha
Capacity of processing plant	60 tons of FFB (Fresh Fruit Bunch)/hour
Location of plantation	Ladang Lada, Ladang Runtu (Kotawaringin District, Central Kalimantan)
Location of processing plant	Sungai Rangit Jaya SP.6 Village, Pangkalan Lada
Capital status	Foreign Investment Company (PMA)

amended Articles of Association, the sale of majority shares to Bernam Advisory Services (BAS) seems to have been closely connected to PT SSS's debt to BAS, as the sale was done through conversion of PT SSS's debt.⁹

United Plantation Group was one of the actors involved in the establishment of the Roundtable on Sustainable Palm Oil (RSPO). At the end of 2007, UP prepared PT SSS for an RSPO audit by Control Union Certification, and began announcing preparations for the main evaluation and consultation through letters to different parties. During the certification process in July and August 2008,

however, social conflicts erupted in PT SSS' concession, in which four Runtu villagers were detained and interrogated by the police, following a report filed by PT SSS charging them with obstructing business operations (in the case of Ali Badri) and battery/assault (in the case of Syahridan). However, it appears that these incidents were deemed irrelevant to the auditing process, since at the end of August 2008 the RSPO review panel issued a certificate for PT SSS (UP) while conflict was still ongoing.¹⁰

■ Location of PT SSS based on the 2007 Location Permit



History, peoples and tenure

Two villages are located within the PT SSS concession: Sungai Rangit Jaya and Runtu. Sungai Rangit Jaya is a new village originally established for migrants from Central, East and West Java who moved into the area in August 1982. Its current population is 1,869 individuals in 569 households. The village of Runtu, on the other hand, dates back to the beginning of the twentieth century. Its population in 2005 was 937 individuals in 305 households.

Runtu village is composed of different ethnic groups, such as the Dayak Ngaju and the Waringin, whose ancestors are thought to be the early settlers of the Runtu area. Other ethnic groups that have settled in this area are the Banjar and the Malay, who migrated from the surrounding areas and intermarried with the local population. These ethnic groups now identify themselves as Runtu people and speak the Runtu dialect (or Waringin language). There are also new settlers from outside the island of Kalimantan, such as from Java, Madura and Bugis (Sulawesi). These populations came to Runtu under the government-sponsored transmigration programme to seek new employment opportunities in the logging, mining and plantation sectors. Today, old and new settlers in Runtu village have been largely assimilated through marriage and other kinship ties.

The people of Runtu and Sungai Rangit Jaya villages make their living from the cultivation of oil palm and rubber. As oil palm farmers, they work with oil palm companies under the plasma system or Income Generating Activities (IGA) scheme developed by PT Astra Group. Prior to the arrival of oil palm companies, these populations cultivated non-irrigated rice, food crops and rubber, fished in the rivers and lakes and collected and sold stones as construction materials. The arrival of commercial plantation companies has greatly affected local communities' economic production patterns. Cultivation of agricultural land has changed from one

based on solidarity and mutual cooperation, to individualised cultivation as paid workers under contracts with companies, backed by working capital, technology and new knowledge introduced by officials from the Agriculture Office and plantation companies.

Until the 1970s, customary institutions were active in Runtu village. These included the *Kepala Padang* and *Pangirak*, who managed public relations and land control, ownership and use, based on traditional laws, norms and customs. The *Kepala Padang* was a local community group leader in charge of coordinating, advising and overseeing the community regarding land ownership and land use. The *Pangirak* performed a liaison function between the people and the community leaders, and collected crops for the purposes of meetings and traditional ceremonies. These social institutions have ceased to exist since the introduction of the village governmental system in the 1980s, which has effectively taken over the authority of these customary institutions and now regulates land ownership and use based on State laws, and sometimes customary laws. The village government is the most dominant institution in coordinating public relations related to administrative affairs, government programmes and initiatives such as land title transfer management. Land management is carried out by individual plantation companies with occasional assistance from government extension officers. Conflicts and disputes are settled by the police and in the formal courts.

In 2008, the provincial government of Central Kalimantan issued Provincial Regulation No. 16 of 2008 on Dayak Customary Institutions in Central Kalimantan, later amended by Central Kalimantan Provincial Regulation No. 1 of 2010 on Amendment of Central Kalimantan Provincial Regulation No. 16 of 2008 on Dayak Customary Institutions in Central Kalimantan. The regulation was issued to empower customary institutions and the rights of indigenous peoples, as well as to support customary laws and

facilitate the implementation of government administration and development. This regulation is valid throughout the territory of Central Kalimantan province, but some of the elders in Runtu village state that they have not been able to use the regulation to strengthen and restore social institutions once existing in Runtu, largely because they are not familiar with the contents of the regulation, and because the regulation has reportedly never been disseminated or promoted by the government at the village level.

Land and forest, including rivers, lakes and peat lands in Runtu village territory, belong to the village and are collectively owned and managed, although there are some family and individual lands obtained based on local customs and laws or through inheritance and purchase. Under the customs prevailing in Runtu village, a person or a certain family can own a forest area if they have cleared it and are using it for agriculture and cropping of, inter alia, rice, oil palm, rubber and fruit trees. Proprietary land also includes ex-cropland which has naturally been re-forested and is generally left fallow.

Most lands in Runtu village are owned by the elders of early settlers who have cleared forest and established rice fields and plantations. Each parcel of land is customarily named after a nearby river (*sei*) and the ownership history of each is well-known to local inhabitants.¹¹ Certain areas, such as watersheds and lakes, are under non-transferable titles and rights over them are limited to usufruct rights.

As in other parts of Central Kalimantan, the Runtu practice land transfer in the form of inheritance, land lease and land purchase. In the inheritance system, land and ex-cropland that have become the property of an individual or a family can be transferred to any family member, man or woman, or to the main family. However, land lease and land purchase systems are relatively new and began to be used after the Runtu starting interacting with outsiders and companies. Land lease and land purchase are conducted

on the basis of agreement by both parties. Village governments are involved in the issuance of Surat Pernyataan Tanah (SPT) or Surat Keterangan Tanah (SKT) (letter of notification for land status), which declare the validity of land tenure and are considered to have legal power in land purchasing and leasing. Land tenure in Sungai Rangit Jaya village, as a former transmigration village, is based on certificates of ownership of two ha per migrant household.

Land acquisition processes

PT SSS conducted a preliminary survey and began clearing in 2004, followed by the establishment of community plantations for migrants in 2005-2006.¹² In Runtu village, this process started in 2008.¹³ Legal documents of relevance to the company's land acquisition process include the following:

1. Location Direction (*Arahan Lokasi*)
 - Principle Approval for Oil Palm Plantation Location Direction No. 590/28/Pem, dated 31st January 2005, regarding a 2,650 ha oil palm plantation located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
 - Principle Approval for Oil Palm Plantation Location Direction No. 590/55/Pem, dated 10th March 2006, regarding a 1,500 ha oil palm plantation located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
 - Principle Approval for Oil Palm Plantation Location Direction No. 590/186/Pem, dated 31st August 2006, regarding a 2,500 ha oil palm plantation located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
 - Principle Approval for Oil Palm Plantation Location Direction No. 590/202/Pem, dated 28th September 2006, regarding a 10,000 ha oil palm plantation located in Runtu village, Umpang village and Suayap village, Arut Selatan Sub-district.

2. Location Permit (*Izin Lokasi*)

- Location Permit No. 89.48042/BPN/II/2005, dated February 2005, for PT SSS' 2,650 ha oil palm plantation located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
- Location Permit No. 664.480.42/BPN/X/2006, dated 5th October 2006, for PT SSS' 9,000 ha oil palm plantation located in Runtu village and Umpang village, Arut Selatan Sub-district.
- Revision of Location Permit No. 266.480.42/BPN/V/2007, dated 14th May 2007, for PT SSS' 1,500 ha oil palm plantation, located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
- Revision of Location Permit No. 267.480.42/BPN/V/2007, dated 14th May 2007, for PT SSS' 2,500 ha oil palm plantation, located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
- Revision of Location Permit No. 268.480.42/BPN/V/2007, dated 14th May 2007, for PT SSS' 9,000 ha oil palm plantation, located in Runtu village and Umpang village, Arut Selatan Sub-district. The justification for the revision was that the area in question overlapped with the HGU of PT ASTRA Group.
- Extension of Location Permit No. 266.480.42/BPN/V/2007, No. 525/820/VIII/2010, dated 2nd August 2010, for PT SSS' 1,500 ha oil palm plantation, located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
- Extension of Location Permit No. 267.480.42/BPN/V/2007, No. 525/820/VIII/2010, dated 2nd August 2010, for PT SSS' 2,500 ha oil palm plantation, located in Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district.
- Extension of Location Permit No. 268.480.42/BPN/V/2007, No. 525/821/VIII/2010, dated 2nd August 2010, for PT SSS' 9,000 ha oil palm plantation,

located in Runtu village and Umpang village, Arut Selatan Sub-district.

3. Plantation Business License (*Izin Usaha Perkebunan; IUP*)

- Plantation Business License for a 2,650 ha oil palm plantation, No. EKBANG/525.26/48/II/2005, dated 7th February 2005.
- Plantation Business License for a 4,000 ha oil palm plantation, No. EKBANG/525.26/597/XII/2006, dated 30th December 2006.
- Plantation Business License for a 9,000 ha oil palm plantation, No. EKBANG/525.26/598/XII/2006, dated 30th December 2006.
- Plantation Business License – Mill for PT SSS with a capacity of 60 tonnes of FFB/hour, No. 525.26/102/EK/2010, dated 28th April 2010.

4. Land Use Title/Right of Exploitation (*Hak Guna Usaha; HGU*)

- Decree on Land Use Title/Right of Exploitation for PT SSS' 2,508.472 ha oil palm plantation No. 81/HGU/BPN/2005, dated 4th July 2005. The HGU is valid for 35 years.

5. Other documents

- Environmental Impact Analysis (AMDAL) document for a 9,000 ha plantation located in Rangda, Sulung Kenambui, Runtu and Umpang villages, dated August 2007. It must be noted that the authors were unable to see a copy of the approval letter for the said AMDAL document.
- BKPM's Approval No.6/V/PMA/2007, dated 8th January 2007, for Change of Status from a Domestic Investment Company to a Foreign Investment Company.
- HO permit, No.1111/Pem.305/HO/XI/2007, dated 24th November 2007, valid for five years.
- BKPM's Principle Approval for Foreign Investment No.284/1/P/II/PMA/2010, dated 22nd November 2010, valid for three years.

Local community perspectives on processes of Free, Prior and Informed Consent

At the beginning of their surveys and attempts to open a plantation in Runtu village in 2005, and in Sungai Rangit Jaya village in 2004, PT SSS's management, the project field operators, and the village as well as the sub-district and the district governments reportedly never held any meetings, information dissemination or consultations, and did not seek the community's consent. The village head and his officials were active in liaising with the project management to facilitate the land acquisition by the company, and the community suspect that the company chose to entertain communications with the village officials only, and not with the wider community.

In certain cases, community members opposed to the development of the plantation sought to obstruct the land measurement and delineation processes. In Sungai Rangit Jaya, the community removed the company's boundary markers in the evening, but the company returned the markers to their places and ordered the community to stop removing them. In another case in June 2008, three members of Runtu, Suriansyah and his two friends, blocked a company bulldozer and were involved in a fist fight with some members of BPD (village representative forum) in Runtu village because they protested against the fact that BPD did not seek to put a stop to PT SSS' activities. Suriansyah was accused of committing criminal acts and was imprisoned. At no point did the police question the eviction of community members by the company and the land annexation that had triggered the dispute in the first place.

In Runtu village, it was reported by community members that the then village head had issued Land Statement Letters (*Surat Pernyataan Tanah/SPT*) to non-Runtu individuals as well as to PT SSS. The village head and his administration (*tim desa*) were reported to have accepted money from the company in the amount of several

billion rupiah. It was also reported that the company pays middle-men from within and outside the communities to coerce community members into surrendering their land, with little compensation, arguing that the company holds a Principle Approval and Location Permit and therefore is entitled to this land. Where community members held BPN-approved land titles, these were also ignored by the company in their acquisition of land.

PT SSS' first owner Suryadi, a relative of the prominent local political elite and former senator Abdul Rashid, has acquired an infamous reputation for reportedly retaining field operatives that have on several occasions committed violence against local communities, as experienced by the people of Runtu in 2005. The migrants in Sungai Rangit Jaya, for instance, revealed that they had suffered severe trauma and found themselves incapable of opposing Suryadi, whose power was backed by wide business networks, and substantial influence and power in Pangkalan Bun and beyond. Abdul Rashid counts among his relatives members of the local legislature and leaders of major parties, such as Sugiyanto of the Indonesian Democratic Party Struggle (*Partai Demokrasi Indonesia Perjuangan/ PDIP*) and HM Ruslan of Golkar Party.

It was reported by community members that neither the company nor the government had provided them with information on, or consulted them about, the Environmental Impact Assessment (AMDAL) or High Conservation Value Assessment (HCVA). Mr. Fitri, a staff member of the Department of Environment of Kotawaringin Barat, however, rebuked this statement, asserting that community representatives as well as village and sub-district officials were involved in the public consultations. The communities, however, refused to be represented by village officials or sub-district officials in the discussion of land title transfers and the AMDAL, thus the legitimacy of these actors in representing the communities in such consultations is highly questionable.

Furthermore, it appears that insufficient assessment or scoping prior to land acquisition and management was conducted, leading to overlaps between the PT SSS concession, adjacent companies' concessions, community lands and conservation forest in Ulin river, Runtu village. Waste and effluents have also reportedly contributed to air pollution, soil degradation and health problems for the communities of Sungai Rangit Jaya.

Disputes over land annexation in Runtu and Sungai Rangit Jaya also reportedly led to factionalisation of the communities between those who accepted compensation for the release of their land, and those seeking to reclaim their land. Compensation terms and amounts were reportedly determined by the company and not the communities, and while negotiation over these terms did take place, the process was highly one-sided in favour of the company, with community members left little choice but to accept the offered amounts or lose their lands without any compensation at all. Demands from community members for compensation based on the value of land and the value of destroyed crops were reportedly ignored, leading to protests, road blockades and illegal harvesting of FFB by community members.

The community of Runtu expressed their discontent in letters sent to the district government, the provincial government, the National Land Agency, the National Commission on Human Rights (Komnas HAM) and the RSPO. Several meetings with government representatives have taken place in which the communities have raised their grievances and demanded remedy but while a number of negotiations with the company have taken place, PT SSS continues to reject community land title claims and rights over the lands under contestation, and no mutually satisfactory solutions had been reached at the time of writing.

In 2009, the Governor of Central Kalimantan issued Governor Regulation No. 13 of 2009 on customary land and customary rights to land to provide recognition and protection

of and respect for indigenous peoples' rights to land. However, interviews with local communities and government representatives appear to indicate that neither are particularly familiar with the said regulation or its implementation.

Legal analysis of PT SSS' permits and operations

As previously explained, a number of legal provisions bind PT SSS in the development of its plantation. Given the fact that PT SSS was established in 2004 and is still in operation, they must abide by regulations applicable since 2004. Regulations that this study will focus on are: 1) the legal status of PT SSS' oil palm plantation business 2) the process of land acquisition by the company 3) the AMDAL 4) PT SSS' Plantation Business License and 5) PT SSS' Land Use Title/Right of Exploitation (*Hak Guna Usaha-HGU*).

Legal status of PT SSS' oil palm plantation

Surya Sawit Sejati's Articles of Association clearly state that it was initially only a Limited Partnership (CV) engaged in the business of selling fertilisers, seeds and farming equipment. This is further confirmed by Domicile Permit No. 336/Pem.305/DC/VII/2004 issued by the Head of Kotawaringin Barat District, which states that CV Surya Sawit Sejati's line of business is selling fertilisers, seeds and farming equipment. The change in the company's status based on the Approval Letter of the Head of Kotawaringin Barat District of 6th December 2004¹⁴, contains provisions confirming that PT SSS' line of business remains that of selling fertilisers, seeds and farming equipment.¹⁵

Yet just under two months later, on 31st January 31 2005, PT SSS obtained the Principle Approval of the Head of Kotawaringin Barat District No. 590/28/Pem regarding Location Direction (*arahan lahan*) for a 2,650 ha oil palm plantation located in Sungai Rangit Jaya village and

Lada Mandala village, Pangkalan Lada sub-district. Within the next few days, the company obtained Location Permit No. 89.48042/BPN/II/2005 for the location stated in the aforementioned location direction. On 7th February 2005, PT SSS obtained IUP EKBANG/525.26/48/II/2005 for 2,650 ha.

Under both its former CV and present PT status, it can be argued PT SSS does not legally qualify to run oil palm plantation operations, as this would need to be stated in its Articles of Association. The documents above state clearly that the company is engaged in the business of selling fertilisers, seeds and farming equipment, which effectively annul all the permits for oil palm plantation business that it has obtained. Other evidence that PT SSS does not qualify to operate an oil palm plantation are the domicile permit issued by the Head of Kotawaringin Barat District (23rd January 2006), which states that the company's line of business is procurement, as well as PT SSS' own Company Registration Number (TDP) which states the same. The fact that oil palm operations are ongoing testifies to the fact that the government bodies issuing the licences above are likely to be turning a blind eye to the actual legal status of the company.

Process of land acquisition

At the time of writing, PT SSS had obtained four principle approval letters on location direction for oil palm plantations in two separate locations, Pangkalan Lada sub-district (6,650 ha) and Arut Selatan Sub-district (10,000 ha). The company has obtained four location permits, three of which are for plantations located in Pangkalan Lada sub-district (6,650 ha) and the last in Arut Selatan sub-district (9,000 ha). Three location permits issued on 5th October 2006 and 14th May 2007 have been revised and once extended.

However, a legal analysis of these location permits shows that three of the four

location permits had expired prior to the granting of the extension (No. 266.480.42/BPN/V/2007; No. 267.480.42/BPN/V/2007 and No. 268.480.42/BPN/V/2007). While these permits were revised on 14th May 2007 and valid for three years, it was not before 2nd August 2010 that they were extended, meaning that the extension was granted three months after the deadline stipulated in the regulations. The legal implication of this is that the extension granted is effectively null and void.

AMDAL

In line with the prevailing regulations, PT SSS is required to produce AMDAL documents covering the entire area of its concession. As stipulated in the Decree of the State Minister for Environmental Affairs No. 17 of 2001 on business and/or action plans that must be completed with Environmental Impact Analysis (AMDAL), AMDALs are required for 'cultivations of annual plants on an area of more than 3,000 ha'. However, to date only one AMDAL has been produced which covers plantations in Runtu, Umpang and Suayap villages, Arut Selatan sub-district (total area of 9,000 ha) whereas no AMDAL has been carried out for plantations in Pangkalan Lada, which covers an area of 6,650 ha. It appears that the company deliberately divided the area into three locations with separate permits to avoid their obligation to conduct an AMDAL for their overall concession.

Furthermore, PT SSS should have produced an Environmental Management Efforts (UKL) document and an Environmental Monitoring Efforts (UPL) document for the three plantations in Pangkalan Lada, as stipulated by the Decree of the State Minister for Environmental Affairs No. 86 of 2002 on Guidelines on Environmental Management Program and Environmental Monitoring Program. However, it is unclear if this was ever carried out for Pangkalan Lada, as the research team were unable to view or access either of these documents.

In addition, whereas legally AMDAL approval by the AMDAL Assessment Commission is a pre-condition for the issuance of an IUP, the AMDAL for the plantations in Runtu, Umpang and Suayap villages was only approved in August 2007, whereas the IUP of these areas was issued in December 2006. The issuance of the IUP prior to the AMDAL is clearly in violation of the laws regulating IUP issuance.

IUP

To date PT SSS has obtained three IUP for Cultivation and one IUP for Production. Two of the IUPs for cultivation were issued on 30th December 2006. Under prevailing laws, IUPs can only be issued after acquisition of land listed in the IUP is completed, as the IUP is adjusted to the total area of land legally obtained by the company in question. However, when these two IUPs were issued, a location permit valid until 2010 for the same location was also still valid covering the same location listed in the two IUPs. If linked to the revision of the location permit in 2007, which implies that there was a change in the total area, it is certain that there is a difference between the area stated in the IUP issued in 2006 and that in the 2007 revised Location Permit. With this, it is sufficient to say that PT SSS has violated the applicable regulation.

Furthermore, in line with Article 8 of the Decree of the Minister of Agriculture No. 357/Kpts/Hk.350/5/2002 on Guidelines on Plantation Business Licensing, it is stated that:

- (1) Each development of plantation business shall engage plantation farmers.
- (2) The development as mentioned in point (1) can be conducted in various patterns, among others:
 - a. Plantation Business Cooperative Pattern, whose working capital is 100% owned by the Plantation Business Cooperative.
 - b. Cooperative-Investor Joint Venture Pattern, in which 65% of the shares is owned by the

cooperative and the remaining 35% is owned by investors/companies.

- c. Investor-Cooperative Joint Venture Pattern, in which 80% of the shares is owned by investors/companies and a minimum 20% of the shares is owned by the cooperative, whose portion will be increased gradually.
- d. BOT (Build, Operate and Transfer) Pattern, in which the plantation establishment and operation are conducted by investors/companies for a pre-determined period and when the period is over, both shall be transferred to the cooperative.
- e. BTN (Bank Tabungan Negara) Pattern, in which the investors/companies set up the plantation and/ or the processing facility which will then be transferred to the interested parties/owners incorporated in the cooperation.
- f. Other development patterns which are mutually profitable, which strengthen and mutually engage both plantation farmers and plantation companies.

In practice, PT SSS reports that they only have a 107 ha plasma estate. This is far from the requirements that have to be fulfilled in line with the IUP administration as stipulated in Article 8 above.

HGU

Currently, PT SSS holds an HGU for 2,508.5 ha of plantations in Pangkalan Lada. This HGU was issued in July 2005, while the other plantations covering approximately 13,500 ha have yet to obtain an HGU. Article 19 of the Decision of the Minister of Agriculture No. 357/Kpts/Hk.350/5/2002 on the Guidelines on Plantation Business Licensing states that plantation companies that have obtained a plantation business license must complete their HGU within two years of the issuance of the IUP. Violation of Article 19 is subject to revocation of the IUP, as regulated by Article 21. Yet in the case of PT SSS, the IUP was issued in 2006 and no HGU had been obtained for the area under the IUP at the time of writing (ie four years beyond the deadline of 2008).

Government perspectives on the operations of PT SSS

Some of the legal irregularities identified above have also been noted by the District Land Agency (BPN) of Pangkalan Bun, who, in interviews with the research team, questioned the company's outdated and unfulfilled administrative obligations, and stated that it was imperative for the company to review and renew their permits to comply with regulations. According to Wahyu, the Head of the Forest Use Department of the District Forestry Office of Kobar, land conflicts would have been avoided had the company and the regional department enclaved the lands within the company's area that are owned and claimed by the communities. However, in relation to the extinction of the titles of communities over their lands within the company's HGU, government representatives interviewed did not see it as essential that legal remedy be provided in response to these communities' written and/or verbal complaints, that sanctions be imposed on PT SSS for administrative violations, or that community land titles be prioritised over the company's HGU.

Awareness and understanding of the government's obligations under international human rights law, including in relation to the right to FPIC, appeared lacking in interviews conducted with representatives of the Kotawaringin Barat district government. No regulations or decisions have been taken which would require company compliance with these laws, and several officials interviewed had never heard of FPIC in the first place. Most had not heard of the RSPO and its functions, or that PT SSS is a member of the RSPO.

According to information obtained from district officials, Regents have the authority to allocate plantation permits the plantation business within the district, including Plantation Business Permits (IUP), Plantation Business Permits for Cultivation (IUP-B) and Plantation Business Permits for Processing (IUP-P). Prior to the issuance of the location

permit, as explained by an official at the District Office of Kotawaringin Barat, the concerned plantation companies have to go through procedural processes administered by a government team in the district. This government team conducts field visits to the lands proposed for the location permit, conduct meetings and compile reports and these determine the issuance of the location permit. The team consists of the Forestry Office (which examines the legal status of the proposed land areas), the National Land Agency (which examines the status of the land and conducts surveys and land delineation in the proposed areas), the Plantation Office (which assesses whether the land is suitable or not for planting crops, and ensures that the company allocates 20% of its proposed concession for communities), the District Economic Office (which assesses the economic situation of adjacent local communities) the District Planning Agency (Bappeda, which investigates spatial planning) and the District Environment Agency (which assesses the potential environmental impacts of plantations in the proposed areas).

A representative of the National Land Agency in Kotawaringin Barat explained that the purpose of the land survey was to assess the physical condition of the proposed land areas, to ascertain the status of land ownership, and to collect data on the social, economic and cultural background of communities in and around the proposed land areas. After this survey, the National Land Agency produces maps and a report, based on which the company applies for the location permit to the Regent. However, the official interviewed stated himself that in the survey and mapping conducted for PT SSS, no consultations with local communities were held, or any other form of coordination or communication with these communities. According to one National Land Agency official interviewed, companies should only need to carry out 'coordination and *sosialisasi*' with local communities and village officials once they have obtained a location permit. The official was adamant that prior to obtaining this permit, consultations were not necessary.

Responses to questions from the research team on the issue of responsibility for land demarcation, for determining whether a company is entitled to receive a permit for targeted lands, and for carrying out consultations with local communities, were vague and contradictory. Some National Land Agency officials were adamant that these responsibilities were in the hands of the Regent, and that the National Land Agency would only intervene where requested by the Regent, and that the responsibility of the National Land Agency was restricted to knowing the status of the area to be allocated and to handle the technical aspects of land demarcation prior to permit allocation by the Regent.

With regards to conflict resolution, government officials stated that conflicts between companies and communities were a private matter, that the government had no role in mediating or resolving such conflicts, and that communities should resort to the court system to seek redress. However, at the same time, they noted that communities were bound to lose through the formal judicial system, since land claims would only be considered if supported by certificates issued by the government.

Very little information on the land acquisition process and operations of PT SSS could be obtained from officials interviewed in Kotawaringin Barat, apart from general information on permits obtained. The National Land Agency Kotawaringin Barat was unable to show the team documents of field visit results and mapping, or the Minutes of Technical Consideration that was used as a reference for the *Bupati* to grant the location permit to PT SSS. Interesting to note is the apparent reluctance of the government officials interviewed to share information on PT SSS' operations. As one noted, 'the owner of the company is a big family here, a big boss here.' The previous owner of PT SSS was described as a financially and politically powerful individual in the district, as well as at the provincial and even national levels. Words used to describe

him and his operations included 'thug' (*preman*),¹⁶ 'cowboy'¹⁷ and 'dynasty'. Use of coercion, threats and intimidation by the previous and current owners of PT SSS were also reported. Certain officials did admit that the legal status of PT SSS' operations was unclear, that their location permit had expired, and that land-related problems in the concession were rife.

Recommendations

- Provision of political and legal support by the local government and the company for the implementation of FPIC and the recognition of communities' rights to land. This support may be in the form of
 - a. facilitation of capacity-building efforts with regards to community legal rights, human rights, the principle of FPIC and its implementation, for government officials, the company as well as the communities
 - b. extensive campaigns and public dissemination and awareness-raising
 - c. monitoring of the implementation of FPIC and respect for land rights
 - d. documentation of local land tenure systems and participatory mapping of community lands
 - e. active community involvement and participation in the gazettement of forest areas, the release of forest areas and the granting of business licenses.
- Strengthening of community rights through education and training on the principle of FPIC and its implementation, and support to community organisation and capacity-building.
- Implementation of a moratorium on new permits to PT SSS, as well as review of all existing permits.
- Greater transparency and wider public participation in the company's AMDAL process with the involvement of local independent NGOs.

References

Approval for Change of Status from Domestic Investment Company (PMDN company) to Foreign Investment Company (PMA company) from BKPM (SK No.6/V/PMA/2007).

Domicile Permit Letter of Head of Kotawaringin Barat District No.48/Pem.305/DC/I/2006.

Head of Kobar District's Approval Letter No. 303/15/Pem, dated 14th December 2004 for Application for Change in Company's Status from CV Surya Sawit Sejati to PT. Surya Sawit Sejati.

Notary Act No.19 by Notary Eko Soemarno on 6th December 2004.

PT SSS Progress Report Year 2012 2nd Quarter.

Sawit Watch (nd) Konflik Berkepanjangan Dalam Perkebunan Sawit: konflik Masyarakat Desa Runtu Kecamatan Arut Selatan Kabupaten Kotawaringin Barat dengan PT. Surya Sawit Sejati (PT. SSS) Holding Company United Plantation.

UP 2013 Group structure. Available at http://www.unitedplantations.com/Investor/Group_chart.asp.

Appendix

No.	Types of Letters	No.	Location	Institutions	Date of Issuance
1	Letter of Domicile Permit under the name of CV SSS, with line of business of selling fertilisers, seeds and farming equipment	336/Pem.305/DC/VII/2004	Pangkalan Bun	Head of Kobar District	12 th July 2004
2	Articles of Establishment of PT SSS, made before Notary Eko Soemarno	Deed of Notary No.19	Pangkalan Bun	Notary	6 th December 2004
3	Head of Kobar District's Approval for Application for Change of Company's status from CV Surya Sawit Sejati to PT Surya Sawit Sejati, with line of business of selling fertilisers, seeds and farming equipment	303/15/Pem	Pangkalan Bun	Head of Kobar District	14 th December 2004
4	Principle Approval for Location Direction for a 2,650 ha oil palm plantation	590/28/Pem	Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district	Head of Kobar District	31 st January 2005
5	Location Permit for a 2,650 ha oil palm plantation	89.48042/BPN/II/2005	Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district	Head of Kobar District	February 2005
6	Plantation Business License (IUP) for a 2,650 ha oil palm plantation	EKBANG/525.26/48/II/2005		District government of Kobar	7 th February 2005
7	Legalisation of PT SSS's Articles of Association from the Ministry of Law and Human Rights	No.C-11413 HT.01.01. TH.2005	Jakarta	Minister of Law and Human Rights	27 th April 2005
8	HGU Certificate of a 2,508.472 ha oil palm plantation under the name of PT SSS, valid for 35 years	No.81/HGU/BPN/2005		National Land Agency (BPN)	4 th July 2005

No.	Types of Letters	No.	Location	Institutions	Date of Issuance
9	Letter of Domicile Permit under the name of PT SSS, with line of business of procurement of goods	48/Pem.305/DC/I/2006	Pangkalan Bun	Head of Kobar District	23 rd January 2006
10	Principle Approval for Location Direction for a 1,500 ha oil palm plantation under the name of PT SSS	590/55/Pem	Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district	Head of Kobar District	10 th March 2006
11	Company Registration Number (TDP) under the name of PT SSS, with main line of business of procurement of goods	No. TDP 150515100177	Pangkalan Bun	Head of Industry and Trade Agency on behalf of Head of Kobar District	13 th June 2006
13	Principle Approval for Location Direction for a 10,000 ha oil palm plantation under the name of PT SSS	590/202/Pem	Runtu village, Umpang village, Suayap village, Arut Selatan Sub-district, Kotawaringin Barat District	District Government of Kotawaringin Barat. The Location Permit was signed by the District Head	28 th September 2006
14	Location Permit for a 9,000 ha oil palm plantation under the name of PT SSS	664.480.42/BPN/X/2006	Runtu village and Umpang village, Arut Selatan Sub-district, Kotawaringin Barat District	District Government of Kotawaringin Barat. The Location Permit was signed by the District Head	5 th October 2006
15	Technical Recommendation on Land Suitability	525/500.1/833/ UT/2006	Kotawaringin Barat District	District Estate Crops Office of Kotawaringin Barat	9 th October 2006
16	Plantation Business License Support under the name of PT SSS	525/500.6/834/ UT/2006	Kotawaringin Barat District	District Estate Crops Office of Kotawaringin Barat	9 th October 2006
17	Letter of Confirmation of Plantation Business License under the name of PT SSS from the Governor of Central Kalimantan to Head of Kobar District for a 9,000 ha land, which is stated as dryland agriculture and swamp scrubland	Unreadable	Kotawaringin Barat District	Governor of Central Kalimantan	23 rd December 2006
18	Plantation Business License (IUP) for a 4,000 ha oil palm plantation	EKBANG/525.26/597/XII/2006		District government of Kobar	30 th December 2006
19	Plantation Business License (IUP) for a 9,000 ha oil palm plantation	EKBANG/525.26/598/XII/2006		District government of Kobar	30 th December 2006
20	BKPM's Approval for Change of Status of PT SSS from domestic company to foreign investment company	No.6/V/PMA/2007	Jakarta	BKPM	8 th January 2007

No.	Types of Letters	No.	Location	Institutions	Date of Issuance
21	Notary Deed regarding the decision of PT SSS's shareholders made before Notary Fathiah Helmi, one point being the approval for the sale of majority shares owned by Al Hakim Hanafiah to Bernam Advisory Servives SDN.BHD Malaysia, as part of PT SSS's debt settlement to Bernam Advisory Services SDN.BHD	Deed of Notary No.10	Jakarta	Notary	19 th January 2007
23	Revision of Location Permit for a 2,500 ha oil palm plantation under the name of PT SSS	267.480.42/BPN/V/2007	Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district	Head of Kobar District	14 th May 2007
24	Revision of Location Permit for a 9,000 ha oil palm plantation under the name of PT SSS, on the ground that the land overlaps with the concession area of PT Astra Group.	268.480.42/BPN/V/2007	Runtu village and Umpang village, Arut Selatan Sub-district, Kotawaringin Barat District	Head of Kobar District	14 th May 2007
25	Nuisance Act/HO permit, valid for 5 years	No.1111/Pem.305/HO/XI/2007	Facility in Ladang Lada	Head of Kobar District	24 th November 2007
26	Letter of the Central BPN to the Regional Office of BPN in Central Kalimantan on company's application for HGU in Central Kalimantan province	2787-310.3-D.II		Deputy of Land Title and Land Registration, Central BPN	15 th August 2008
27	Plantation Business License (IUP) for Production, with the capacity of 60 tonnes of FFBS/hour under the name of PT SSS	525.26/102/EK/2010		District Government of Kobar	28 th April 2010
28	Extension of Location Permit for a 1,500 ha oil palm plantation under the name of PT SSS No. 266.480.42/BPN/V/2007	525/820/VIII/2010	Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district	Head of Kobar District	2 nd August 2010
29	Extension of Location Permit for a 2,500 ha oil palm plantation under the name of PT SSS No. 267.480.42/BPN/V/2007	525/820/VIII/2010	Sungai Rangit Jaya village and Lada Mandala village, Pangkalan Lada Sub-district	Head of Kobar District	2 nd August 2010
30	Extension of Location Permit for a 9,000 ha oil palm plantation under the name of PT SSS No. 268.480.42/BPN/V/2007	525/821/VIII/2010	Runtu village and Umpang village, Arut Selatan Sub-district, Kotawaringin Barat District	Head of Kobar District	2 nd August 2010
31	BKPM's Principle Approval for Foreign Investment, valid for 3 years	No.284/1/P/II/PMA/2010	Plantations in Ladang Lada and Ladang Runtu	Head of BKPM	22 nd November 2010

Endnotes

1. See Domicile Permit Letter of Head of Kotawaringin Barat District No.48/Pem.305/DC/1/2006 issued for PT SSS on 23rd January 2006.
2. See Head of Kobar District's Approval Letter No. 303/15/Pem, dated 14th December 2004 for Application for Change in Company's Status from CV Surya Sawit Sejati to PT Surya Sawit Sejati.
3. The exact date of this change is unknown as the authors were unable to obtain data on the amendment of PT SSS's Articles of Association. As a matter of fact, up to 13th June 2006, PT SSS was still declared as a company engaging in the business of procurement as registered in the Company Registration Number (*Tanda Daftar Perusahaan/TDP*) No. TDP 150515100177 issued by the Industry and Trade Office of Kotawaringin Barat. A month later, on 23rd July 2006, PT SSS submitted an application for a location direction (*arahan lokasi*) permit for oil palm plantations based on the company's application No.048/SSS-PB/ADM/VII-06 to the Head of Kotawaringin Barat District.
4. See PT SSS' Progress Report Year 2012 2nd Quarter.
5. Approval for Change of Status from Domestic Investment Company (PMDN company) to Foreign Investment Company (PMA company) from BKPM (SK No.6/V/PMA/2007). See the structure of the company's group showing shares owned by the subsidiaries of UP at http://www.unitedplantations.com/Investor/Group_chart.asp.
6. See the structure of the company's group showing shares owned by the subsidiaries of UP at http://www.unitedplantations.com/Investor/Group_chart.asp.
7. In Notary Act No. 10 of 2007 on change of company status issued by Notary Fathiah Helmi, Suryadi and Soedjai are listed as the holders of minority shares in PT SSS.
8. Based on PT SSS' Progress Report Year 2012 2nd Quarter.
9. Ibid.
10. See Sawit Watch (nd).
11. Examples of such lands include *Sei Manggis*, *Sei Rusa*, *Sei Koruh*, *Sei Borumbun*, *Sei Toman*, *Sei Dadab*, *Sei Poruluyan*, *Sei Arut*, *Sei Sakawa*, *Sei Bigar*, *Danau Batang Pagok*, *Sei Sintang*, *Sei Marukulam* and *Sei Toras*.
12. Interview with Ali Badri and Julian Sahri, a villager from Resident Unit 6 (*Satuan Pemukiman 6*), Sungai Rangit Jaya of Pangkalan Lada Subdistrict.
13. Interview with Ali Badri and Suriansyah, 17th July 2011.
14. The establishment of SSS as a limited liability company (PT) was legalised in Notary Act No.19 by Notary Eko Soemarno on 6th December 2004.
15. See the Approval Letter of Head of Kobar District on change of status from CV Surya Sawit Sejati to PT Surya Sawit Sejati, No. 303/15/Pem dated 14th December 2004.
16. Preman derives from *Freeman*, a term used in Indonesia to refer to arrogant, violent and uncouth person[s] and outlaws.
17. The term cowboy is locally used to refer to individuals acting without regard for the law.

PT Mustika Sembuluh and the Dayak Temuan of Central Kalimantan

3

Sophie Chao, Agustinus Karlo Lumban Raja, Fandy Achmad Chalifah and Tawangatri Kusumohartono



Introduction

PT Mustika Sembuluh is one of seven subsidiary companies owned by Wilmar International (member of the RSPO since 2005) in Central Kalimantan. PT Mustika Sembuluh was awarded RSPO certification on 11th August 2010 (valid until 10th August 2015) after a certification assessment by PT TUV Rheinland on 19th – 23rd October 2009 of its mill and three estates, with verification of closure of the major non-conformances identified carried out on 12th – 13th December 2009.¹ PT MS is among the first of Wilmar's holdings in Indonesia to have been assessed against the RSPO standards and also the first plantation company in Kalimantan to receive RSPO certification, according to the Wilmar CSR Tribune.²

■ *Ritual offerings for the resolution of conflict between the village of Pondok Damar and PT Mustika Sembuluh, Estate 1 Block 2 / Sophie Chao*

The concession of PT Mustika Sembuluh was chosen by the NGO consortium for assessment for a number of reasons. First, local communities in this area have experienced several land conflicts and forced displacements due to oil palm expansion on their customary lands since at least 1996, including prior to the acquisition of the concession by Wilmar, prompting repeated community protests and ensuing investigations and mediation by local and international NGOs. On the other hand, the 2010 audit of PT Mustika Sembuluh suggests that the company has established and maintained an effective system to ensure

compliance with the RSPO principles and criteria. For example, 1,711 ha of customary lands had reportedly been enclaved for local communities' use. The audit report also states that satisfactory compensation was paid to all parties, and that local communities accepted and participated in the mapping of the boundaries of the concession. Iterative stakeholder consultations were also reportedly held. It was thus assumed that positive lessons could be learned from this company's approach and implementation of FPIC in order to inform best practices in other oil palm concessions.

However, PT Mustika Sembuluh was also chosen because some major indicators were not fulfilled during the main assessment in 2009 and some major non-conformances were raised. These included ongoing land disputes over destroyed graveyards (Criterion 2.2), lack of identification and documented agreements between PT Mustika Sembuluh and local communities with regards to their traditional rights and usage of the land (Criterion 2.3), lack of monitoring and surveillance of HCVs (Criterion 5.2) and lack of regular monitoring and management of social impacts, with the participation of local communities (Criterion 6.1). The company proposed corrective action for all identified non conformities to the certification body within 15 days of the closing meeting. Part of the assessment team's objectives was therefore to ascertain whether and how these non-conformances have been resolved on the ground in a way that is satisfactory to all parties involved.

Area in Question

Constituting one of the four provinces of Indonesian Borneo, Central Kalimantan is located on the southern coast of Borneo and extends over an area of around 15 million ha, representing the third largest Indonesian province. Central Kalimantan is bordered by West and East Kalimantan provinces to the north, by the Java Sea to the south, by South and East Kalimantan provinces to the east,

and by West Kalimantan province to west. The Schwaner Mountains stretch from the north-east of the province to the south-west, 80% of which is covered in dense forest, peatland swamps, mangroves, rivers, and traditional agricultural land. The centre of the province is covered with tropical forest, which produces rattan, resin and valuable timber such as Ulin and Meranti. There are two protected areas within the region, Tanjung Puting National Park (more than 100 km to the west of PT Mustika Sembuluh) and Sebangau National Park (more than 30 km to the east of PT Mustika Sembuluh). The southern lowlands are dominated by peatland swamps that intersect with several rivers. The province's climate is wet weather equatorial zone with an eight-month rainy season, and four months of dry season.³

Until recently a highly forested region with mineral soils and vast areas of peat, Central Kalimantan has seen extensive areas of forests and peatlands allocated and cleared for oil palm, particularly over the last decade. To this day, Central Kalimantan remains largely dependent on natural resource exploitation, including gold and coal mining, forestry, timber estates and oil palm plantations.⁴ Oil palm development is a central part of Central Kalimantan's development strategy, with over one million ha planted and over three and a half million ha allotted to oil palm, including areas in early phases of licensing.⁵ In East Kotawaringin (or Kotim) district alone (where a large part of the PT Mustika Sembuluh concession is located), over 50% of the total area has now been allocated to oil palm (around 1.5 million ha), constituting the district with the largest area of oil palm plantations.⁶ In May 2011, a two-year moratorium was placed on new permits for converting natural forests to plantations, as part of the Norway-Indonesia Partnership on REDD+. However, there is evidence that the conversion of peatland and peat forest for oil palm development is continuing illegally.⁷

The district of East Kotawaringin extends from the hilly Schwaner Mountains in the

saw the expansion of colonial exploration and political control over the hinterland.¹⁰ East Kotawaringin became a district on 3rd August 1950 upon the issuance of Decision Letter 154/OPB/92/04 by the Governor of Kalimantan. Seruyan, originally part of East Kotawaringin district, became a district of its own in 2002 under regulation No.5/2002 and now covers five sub-districts (Danau Sembuluh, Hanau, Seruyan Hulu, Seruyang Tengah and Seruyan Hilir).

The indigenous peoples of Central Kalimantan are Dayak¹¹, traditionally forest-dwelling peoples who self-identify as Njagu, Ot Danum and Dusun Ma'anyan Ot Siang, Temuan, Lawangan, Taboyan, Dusun Siang, Boyan, Bantian, Dohoi and Kadori.¹² In addition to the indigenous Dayak tribes, the province is also inhabited by ethnic groups from other areas of Indonesia, including Javanese, Madurese, Batak, Toraja, Ambonese, Bugis, Palembang, Minang, Banjarese, Makassar, Papuan, Balinese, Acehnese and Chinese. Resentment of preferential treatment given to non-Dayak led to widespread violence and killings of migrants, mainly Madurese, during the late 1990s and early 2000s.¹³

There are three villages within the PT Mustika Sembuluh concession:¹⁴ Desa Pondok Damar (North Mentaya Hilir sub-district, East Kotawaringin district) is located in PT Mustika Sembuluh Estates 1 and 2. Desa Tanah Putih (Telawang sub-district, East Kotawaringin district) is located in PT Mustika Sembuluh Estate 3. Desa Bangkal (Danau Sembuluh sub-district, Seruyan district) is located in PT Mustika Sembuluh Estate 2. According to the company's Social Impact Assessment (SIA) report dated September 2009, the total population of these three villages is of around 1,608 households or approximately 6,128 people,¹⁵ of which the majority are indigenous Dayak Temuan, as well as a minority of incomers, such as Javanese and Batak.

The Dayak Temuan, according to community members, originated from Lamandau region, an area bordering West Kalimantan. The communities of the three

villages within the PT Mustika Sembuluh concession also include a minority of Javanese and Bugis, as well as some families from Flores. Five religions are practised (Islam, Christianity, Pentecostalism, Catholicism and Hinduism), as well as Hindu Kaharingan, an ancestor worship-based religion which is said to have developed around 30 years ago and is unique to Central Kalimantan. The seat of this religion is the Hindu Kaharingan Grand Council in Palangkaraya. Adherents maintain that these descend from the Kutai kingdom, an eastern Borneo state dating from the fourth century whose religion was imported from India. Over time, this belief system was lost in Kutai amid colonisation by the Dutch and missionary activities by Christian missionaries and has now been revived in Central Kalimantan. The religion of Hindu Kaharingan is anchored in the Panaturan, or holy book, and practised by a body of priests, referred to as *mandung*. While Hindu Kaharingan is not an officially recognised religion in Indonesia, and appears to bear little relation to Hinduism, adherents of the faith maintain that it is also an attempt to keep their cultural identity separate from the religious identities sanctioned by the State, and a reaction in part to decades of generally unwanted Western missionary activity.

Community members claim to have been living in the villages of Pondok Damar, Tanah Putih and Bangkal for at least 150 years, as testified by their ancestral graves. In the 1970s, these communities saw their customary lands gradually taken over by a number of both legal and illegal logging companies (following the issuance of HPH licences in the area), and oil palm plantations from the early 1990s, including PT Agro Indomas (Agro Hope Sdn Bhd), PT Hamparan Mas Sawit Bangun Persada (Best Group), PT Agro Mandiri Perdana (Sinar Mas) and PT Mustika Sembuluh (Wilmar Group). Prior to the arrival of the companies, community members described the area as a lush and forested region with diverse vegetation and several rivers on which they depended for transport and water supplies.

Our forests were lush back then, and the river was the source of our fish to eat. We used to hunt game, such as deer, boars and wild birds. (community member)

The communities of Pondok Damar, Tanah Putih and Bangkal traditionally depended on shifting agriculture and garden cultivation for their livelihoods, complemented by game, fish and vegetables obtained from the forest. These traditional practices continued up to the late 1990s, according to community members, at which point they gradually diminished, largely due to the shrinking of available forest land to practise shifting agriculture because of conversion to logging and oil palm concessions, and government policies banning forest burning (eg Regional Law No. 5/2003 in Central Kalimantan).

We used to follow what our fathers, and their fathers, and our ancestors used to do on the land. We would burn the land first, because this increased the fertility of the soil, and we also burned the land with our own customary techniques, to prevent it from spreading out of control. We would dig a ditch around the area and tend the fire carefully, in accordance with custom. (community member)

Rubber cultivation is the main source of income for most communities today, in addition to smaller plots of oil palm and fruit gardens (durian, rattan, jackfruit, *cempedak*, rambutan and mangoes). While most communities own their own rubber and/or oil palm smallholdings, some are involved in oil palm plasma schemes with PT Mustika Sembuluh. While the riverine trade of fish and scented woods (such as camphor) has now decreased as a result of water pollution from neighbouring oil palm plantations, rivers as routes of trade, transport and migration still play a prominent role in the lives of these communities.¹⁶

The land ownership system of the Dayak Temuan is inextricably linked to the practice of shifting agriculture, and land cleared for cultivation becomes the property of the household whose labour has gone into the clearing.¹⁷ Land opened and farmed is

inherited cognatically and land is evenly distributed among the children upon their marriage, or upon the death of their parents. According to community members interviewed, married couples manage their plots jointly but maintain distinct ownership. In cases of divorce, community members explained that the land of the initiator of the divorce is passed on to the other spouse, or to their children. The opening of land does not generally require permission from the *adat* (customary) leader (*mandung*), although forest land may do, particularly if there are historical or sacred sites nearby. Land owned by households today can range from three ha to over 30 ha and both men and women share the tasks of gardening, maintenance, fertilisation and rubber tapping. Women interviewed reported that when the forest was still intact, their work included gathering mushrooms, vegetables and edible ferns, herbal medicines, flammable resin and scented woods, such as aloe wood.

Rights to control and use land are customarily demarcated with the planting of certain crop trees (usually fruit and rubber) along the borders of the land. Oral testimony from households cultivating land directly adjacent to the land in question is also considered an important form of proof of households' and individuals' right of use and ownership (these witnesses are referred to as *saksi sebatas*, or border witnesses). Oral evidence continues to play a key role in the value system and social structure of the Dayak Temuan, and is often perceived locally as of greater importance than written documents, such as land certificates or other documents.

Because among us, we are already bound by a consensus to respect each other's land and property, to look after each other's rights, we do not seek to take over land opened or worked on by other people. If there is conflict over land borders, then these are also resolved through *adat* and through mutual respect.

However, today's communities are increasingly keen to obtain Land Information Certificates (*Surat Keterangan Tanah* or *SKT*) in order to prove their rights

to land in the face of incoming pressures from oil palm companies.

Honestly, we don't know why we need SKTs, because the fact that we worked these lands for generations and made them what they are today, is our evidence that the land belongs to us. That is our proof. But the SKTs are recognised, and our labour on the land isn't

Land conflict

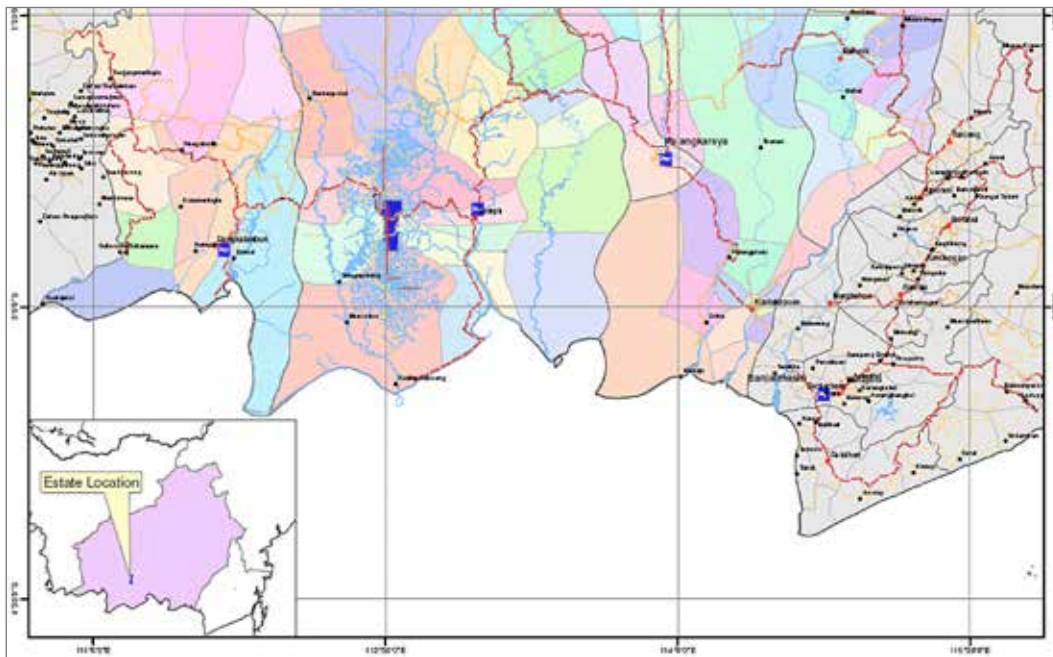
Oil palm expansion in Danau Sembuluh has been a source of conflict since the mid-1990s, beginning with PT Agro Indomas, whose indiscriminate land clearing activities led to the destruction of sacred graves and the eviction of communities from Terawan, Bangkal and Lanpasa. Land conflict and forced displacements have also been reported as a result of the activities of oil palm companies PT Kerry Sawit Indonesia, PT Sawit Mas Nugraha Perdana, PT Rungau Alam Subur and PT Salonok Ladang Mas. Community responses have ranged from the submission of letters of rejection and negotiation with the companies, to demonstrations and the capture of company property. The main grievances have been the loss of customary land, the lack of 'socialisation' or *sosialisasi* (understood as consultation to inform communities of planned developments) undertaken by the companies prior to their operation and unsatisfactory or non-existent compensation offers.¹⁸ For example, unresolved compensation claims from the communities whose lands and plantations were lost led to demonstrations in July 1998 by the communities of Bangkal, Terawan, Lanpasa and Sembuluh I in front of the Parliament of East Kotawaringin, and again in October 1999. Sembuluh I and Bangkal community members protested in November 1999 by cutting off access to a bridge crossing the river Rungau and used by the company. Between October and November 2000, community members of Sembuluh I and Sembuluh II held company equipment hostage (bulldozers, tractors and other heavy machinery) and directly

confronted plantation workers, demanding that the company suspend its activities until dialogue and consensus was achieved with the communities. A number of ongoing land conflicts were reported by community members of Tanah Putih and Pondok Damar, which are explored in more detail in the following sections.

PT Mustika Sembuluh's operations

PT Mustika Sembuluh was founded on 29th November 1988 in Palembang as PT Rimba Ogako Hayu and was renamed on 12th February 1994, with its base relocated from Palembang to Palangkaraya. In November 1999, part of PT Mustika Sembuluh's shares were transferred to PPB Oil Palms Berhad based in Malaysia and approved in a Decree from the Minister of Justice and Human Rights on 26th August 2005. In 2007, PPB Group Berhad merged PPB's oil palm plantation and edible oils trading and refining businesses with Wilmar International Limited and is presently the largest shareholder in Wilmar with 18.3% interest. PPB Group Berhad has an investment of 90% interest in PT Mustika Sembuluh. On 23rd November 2005, the company made an application to the Department of Industry and Trade, Central Jakarta for the expansion of PT Mustika Sembuluh over 10,000 ha on 17,500 ha of land reserves, located in Danau Sembuluh and Kota Besi sub-districts, East Kotawaringin District, Central Kalimantan Province.

The concession of PT Mustika Sembuluh is located in the central to southern part of Wilmar's Central Kalimantan Project (CKP), Central Kalimantan province, Indonesia. It extends over parts of two districts (*kapupaten*), Kotawaringin and Seruyan, and three sub-districts (*kecamatan*), North Mentaya Ilir, Telawang (both part of East Kotawaringin district) and Danau Sembuluh (part of Seruyan district). The Mustika Sembuluh estates are surrounded by several other oil palm plantations: PT Maju Aneka Sawit and PT Septa Karya Damai on the eastern border; PT Suka Jadi and PT Bumi Sawit Kencana



(Wilmar) to the north and north-west; PT Hamparan Mas Sawit BP to the west; and Wilmar's estates PT Rimba Harapan Sakti and PT Kerry Sawit to the south. Wilmar's six other oil palm plantations in Central Kalimantan are: PT Karunia Kencana Permaisejati, PT Bumi Sawit Kencana, PT Mentaya Sawit Mas, PT Kerry Sawit Indonesia, PT Sarana Titian Permata and PT Rimba Harapan Sakti. The seven Wilmar-owned companies operate a combined 84,000 ha of oil palm plantations of which 71,000 ha are already in production stage.

PT Mustika Sembuluh is composed of three estates and one mill in operation since 2006, which receives supplies from the three estates, as well as from several other company-owned estates and several outgrowers. Mustika Estates 1 and 3 are located in East Kotawaringin while Mustika 2 is located in Seruyan District. The total land holding of PT Mustika in 2010 was of 22,011 ha, of which 15,604 ha had been planted. 3,403 people were employed on a permanent and temporary basis on the plantation in September 2009. Company representatives reported that there are no plans for further expansion of the concession.

Six High Conservation Value areas (HCVs) were identified within the three estates of PT Mustika Sembuluh concession by

■ *Location map of PT Mustika Sembuluh within Central Kalimantan (RSPO Public Summary Report 8/9/2010, p.5)*

Malaysian Environment Consultant in their HCV Assessment (HCVA) dated 29th October 2009.

- HCV 1 areas (Forest areas containing globally, regionally or nationally significant concentrations of biodiversity value) identified in MS 1, MS 2 and MS 3;
- HCV 2 areas (Forest areas containing globally, regionally or nationally significant large landscape level forests) identified in MS2 and MS3. This includes an HCV 2.2 area (large level landscape forest) identified in MS 2;
- HCV 3 area (Forest areas that are in or contain rare, threatened or endangered ecosystems) identified in MS 3;
- HCV 4 area (Forest areas that provide basic services of nature in critical situations) identified at MS 1, MS 2 and MS 3 estates. This includes HCV 4.3 areas (forests critical to water catchment and erosion control) located at MS 1 and MS 2;
- HCV 5 areas (Forest areas fundamental to meeting basic needs of local communities) identified in MS 1, MS 2 and MS 3 estates; and

- HCV 6 areas (Forest areas critical to local communities' traditional cultural identity) identified in MS 1 and MS 3 estates.

The forest areas within the concession are a mix of secondary forest and agro-forestry, including bamboo, rubber, cassava and various fruit trees, including rambutan and durian. Rare ecosystems were identified in the *kerangas* forest and along the borders of the Rinjau river that flows through it.

Legal status of PT Mustika Sembuluh

According to data obtained from the Plantation Office of Central Kalimantan, as of 31st December 2011, PT. Mustika Sembuluh had secured the following permits from both the regional and central government:

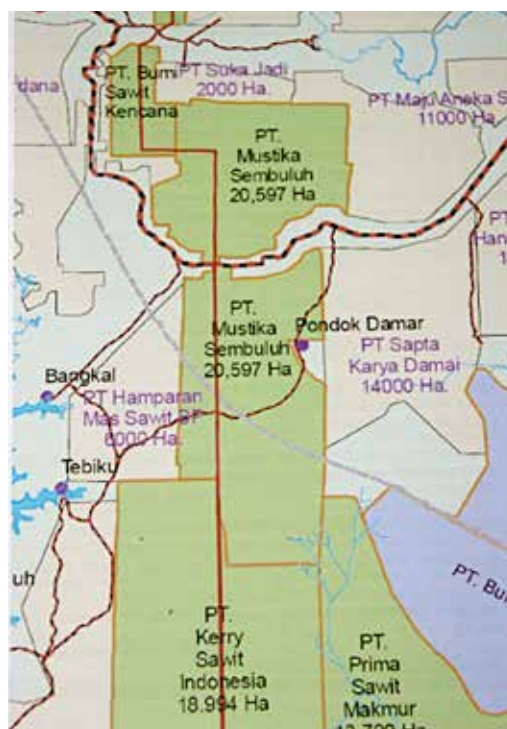
1. Location directive (*Arahan Lokasi*) from Bupati of Kotawaringin Timur, Number. 382/400.460.11.91 in March 1991 with an area of 17,500 ha.
2. Location Permit (*Izin Lokasi*) from Bupati of Kotawaringin Timur, Number. 382/400.460.11.91 in March 1991 with an area of 17,500 ha.
3. Location permit (*Izin Lokasi*) from Bupati Seruyan, Number. 7.460.42 on 16th October 2003 with an area of 4,000 ha.
4. Plantation Business Permit (*Izin Usaha Perkebunan*) from the Governor of Central Kalimantan, Number 343 of 2003 in August 2003 with an area of 15,990 ha.
5. Forest Area Release Permit (*Izin Pelepasan Kawasan Hutan*) from the Minister of Forestry, Number. 695/kpts-II/1996 in November 1996 with an area of 15,994 ha.
6. Business Use Right (*Hak Guna Usaha*) from BPN, Number. 01/540/HGU/BPN.42/2000 in September 2000 with an area of 166.306 ha.
7. Hak Guna Usaha from BPN, Number. 03/540/HGU/BPN.42/2000 in December 2000 with an area of 144.88 ha.
8. Hak Guna Usaha from BPN, Number. 8/HGU/BPN/2005 in February 2005 with an area of 5,227 ha.
9. Hak Guna Usaha from BPN, Number. 2-HGU-BPN RI-2007 in February 2007 with an area of 1,990.320 ha.
10. Hak Guna Usaha from BPN, Number. 3-HGU-BPN RI-2007 in February 2007 with an area of 5,169.280 ha.
11. Hak Guna Usaha from BPN, Number. 29/HGU/BPN RI/2011 in June 2011 with an area of 6,188.804 ha.
12. Hak Guna Usaha from BPN, Number. 52 on 16th August 2011 with in area of 563.674 ha¹⁹

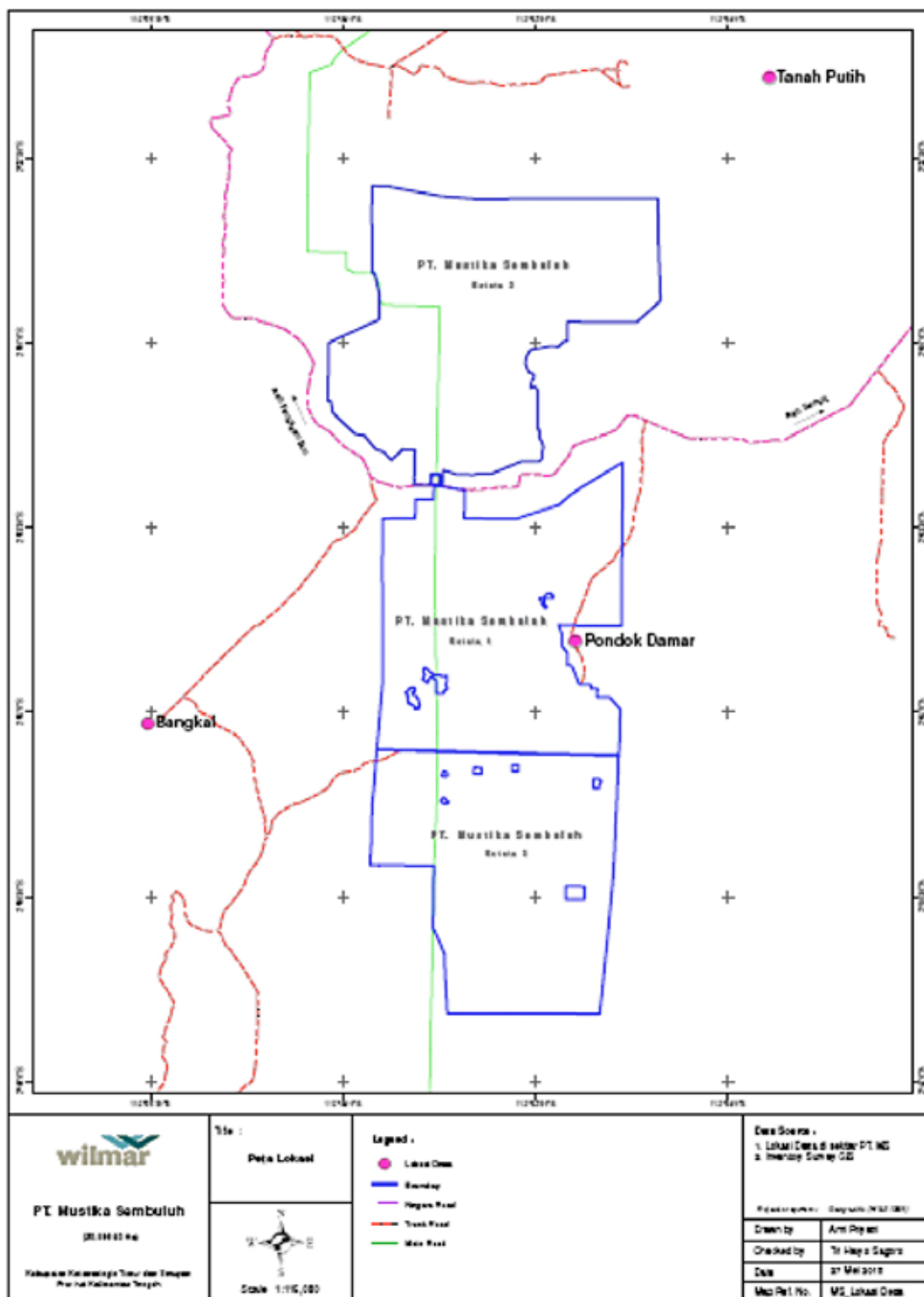
Community perspectives

Pondok Damar

The flags on the poles that we have placed to block the road of PT Mustika Sembuluh bear the colours of our plight. Red is blood. Yellow is a warning of caution. And white is transparency and clarity. For now, the last one remains a wish. (Protester from Pondok Damar village)

■ Map of PT Mustika Sembuluh and surrounding concessions





The village of Pondok Damar is located in the east of PT Mustika Sembuluh Estates 1 and 2. It covers an area of 14,100 hectares with a total population of 832 individuals (or 200 households), 85% of whom are Dayak Temuan. The community of Pondok Damar claims to have lived in this area since at least the Dutch period, and to have grown out of a number of smaller neighbouring communities who moved there to access

■ *Map of PT MS Estates 1, 2 and 3, and PT MS Palm Oil Mill. Source: RSPO Public Summary Report 8/9/2010, p.6*

the river. The village of Pondok Damar is fully surrounded by PT Mustika Sembuluh's plantations and was the location of PT MS's first estate. The community there has been in conflict with the company on and off ever since it was established, due to land grabbing,

unfulfilled promises of employment and plasma and lately, pollution of the rivers due to mill effluents. A significant cause of these conflicts was reported as the lack of involvement and participation of the community in negotiation and consultation with the company about its activities.

General discontent with the operations of PT Mustika Sembuluh was made evident from the first day of the NGO consortium's visit to Pondok Damar on 24th June 2012. At the time, the community was on the third and last day of a protest against the company, attended by over 200 villagers who blocked a company road within the concession leading to their village (see Box 'Hinting Pali ritual in Pondok Damar')

Various accounts were received from community members of Pondok Damar interviewed regarding how PT Mustika Sembuluh obtained the land for its oil palm concession. In some cases, the company had begun land clearing without informing the customary landowners, promising compensation at an indefinite time in the future. In other cases, company

representatives were reported to have used the permits already obtained to intimidate the communities and pressure them into surrendering their land. With their limited knowledge of the law, the communities reported not having had the courage to debate the company's arguments, believing that their own lack of legal documents proving their rights to the land outweighed the fact they had cultivated the land for generations. Many individuals reported that *sosialisasi* had been minimal, and where carried out, had not provided them with sufficient information to make informed decisions about whether or not to accept the company's operations on their customary lands.

In a limited number of cases, intimidation from security apparatus, and the co-optation of village officials was reported. In others, the company offered compensation for less land than the company ended up taking. In one case, for example, one community member explained that he had five ha of land and only agreed to sell three ha to the company with the intention that the remaining two ha would be worked by him. In reality, all five ha were cleared by the company and his complaints ignored.

■ *Road block protest against PT Mustika Sembuluh due to unresolved land conflicts and water pollution, Pondok Damar / Sophie Chao*

We were forced to accept compensation, on the terms of the company, due to this forceful land transfer. If we resisted, we faced the security



apparatus brought in to guard the company's operations. The company also used village officials and village figures to pressure the people and manipulate information. Our village chief told us back then that if anyone refused to give up the land the company would proceed to clear those lands anyway because they had the permit, and because our lands are State land anyway. (Pak Burhan)

Community members interviewed mentioned that prior to the establishment of the PT Mustika Sembuluh plantation, some *sosialisasi* by the company had been carried out, and consisted of certain community members being invited by the company to learn about the benefits of oil palm plantations. Apart from describing the positive dimensions of their project, the company also promised to hire community members to work on the plantation and to offer them plasma. However, no negative potential impacts were described at the time, including the risk of water pollution.

The company came to us and asked for our help to develop their oil palm plantation. They asked us to release our land and to join a plasma scheme with them. We were happy to do plasma back then. It was all verbally discussed. We didn't have any written contracts with the company. In fact, the company has never been down to our village since 2008. Today, our fate is to be stuck right in the middle of two oil palm plantations [PT Mustika Sembuluh and PT Septa Karya Damai]. (Pak Jamin)

According to some community members, no alternative options were offered by the company when they first contacted the community and informed them of their intention to develop an oil palm plantation. A number of individuals reported that they had not received compensation for the land they released to the company back then. Some reported pressure from local officials as well as threats of imprisonment should they refuse to give up their land. Those who refused saw their land cleared, often late at night, without prior warning.

One community member had joined the plasma scheme but appeared confused as to

the actual terms of his agreement with the company.

I have a contract with the company but honestly, I'm not sure what it says. I understood it when I discussed it with the company at the time, but I'm not clear on the exact terms. All I know is that I receive a certain amount of money (Rp. 100,000) at the end of every six months. Is this compensation or actually payment? I don't know. To me, it is more like compensation for what has been lost, not payment. (community member)

Individual community members who are part of the plasma scheme do not have copies of their contract as these are kept with the head of the cooperative. Those who have not joined the plasma scheme are reportedly allowed to plant five oil palm trees each, the fruit of which, sold for 7,000 Rp per kilo, brings them an income of around 70,000 Rp per month. Several reported that they did not join the plasma scheme voluntarily:

At least with the plasma, we can earn a little bit more, but even then, we are only paid at the end of every six months. We were forced to accept it on their terms. *Sosialisasi* was not about getting our point of view. It was basically the company informing us of what was going to happen on our land and negotiating the terms of our involvement in their project. It's not like we were asked whether we agreed to anything. If we had known back then this would happen, we would never have accepted. Now, we just want to burn it all down. (community member)

Significant resentment was also expressed regarding the lack of local employment opportunities offered by the company to local community members. Only 20 individuals from Pondok Damar are reportedly employed by the company, and on a part-time basis.²⁰ Several community members complained that they had not been given opportunities to benefit from the plantation development.

The only thing we are allowed to do is to pick the leftover palm fruit. It's enough to pay for some food only. No more. And we have no contracts for this. (Mas Rudi)

***Hinting Pali* ritual in Pondok Damar**

The protest held on 21st – 23rd June 2012 was referred to by community members as *hinting pali*, a customary ceremony of the Dayak in the region, intended to pacify areas subject to conflict between two parties and to seek a peaceful and mutually beneficial resolution to the conflicts. The rattan rope and a *sawang* leaf used are believed to dispel evil spirits that bring about disasters.

Posters displayed at the *hinting pali* in Pondok Damar stated the demands of the community:

1. Unresolved water pollution from the PT Mustika Sembuluh mill on 1st January 2012.
2. Lack of implementation of the agreement between PT MS and the community of Pondok Damar over pollution of the river from mill water of PT Mustika Sembuluh in 2008.
3. Land grabbed from the community by PT Mustika Sembuluh.

The protest was ended with a large gathering of community members, the village head, company representatives, police in civilian clothing, one army representative and the head of the sub-district of North Mentaya Hilir (the NGO consortium were invited by the village head to attend). Prior to that, water buffaloes were sacrificed by Pondok Damar to appease the ancestors and request their help to resolve the problems they faced with PT Mustika Sembuluh. The community demanded that the company provide buffaloes and pigs for a second sacrifice to mark the end of the blockade and act as a binding agreement between them and the community to resolve the existing conflicts. This was accepted by the company. A written agreement was also signed by all the stakeholders above and the government representatives present pledged to resolve the conflict.

Protester from Pondok Damar explained that they were not only protesting against the lack of action taken by the company to remedy the pollution of the rivers and compensate affected communities, but also against the lack of information made available to them by the company about their activities in the first place, and the lack of employment opportunities offered to local community members, as originally promised.

We lack information. There is so much we do not know. We feel insecure, and unemployment is rife. We are not given jobs by the company. (Mas Udin)

We don't feel safe here. The army and BRIMOB [mobile brigade] frequently come through the plantation. (Mas Udin)

The situation was so much better before. The only poor relation we have is with the company. They have violated our *adat* laws. (Mas Rudi)

We don't want violence. We will always seek the peaceful way to resolve problems. But do I believe that today's agreement will resolve our conflicts? It all looks fine for now, but they [the company] will just go back to their usual ways. (Mas Rudi)

■ *Government, company and community representatives sign an agreement to resolve ongoing conflicts between Pondok Damar and PT Mustika Sembuluh, 27th July 2012 / Carlo Nainggolan*





Few community members interviewed reported having been involved in the HCV assessment, and only found out about the existence of the HCVs once the signposts had been erected. On the other hand, the company reports having carried out a public consultation on HCVs with consultants on 29th November 2007 which was reportedly attended by 50 stakeholders. Community members were reportedly involved in the development of an MoU on customary rights/traditional rights management and HCV management on 13th November 2009, attended by 42 individuals of which 21 were from Pondok Damar and 21 from the company.

With regards to HCVs, some community members reported that part of their *adat* land (gardens and paddy fields) had been classified as HCVs but appeared confused as to whether these areas were (and should be) within the HGU or enclaved from the HGU:

We are completely confused about this HCV thing. Some consultants came to us, measured the land, and then told us that these areas were now HCVs. We are not allowed to practise slash-and-burn there anymore, or fish, or hunt, like we used to. But this is our *adat* land. We are not sure if these HCVs are supposed to be in the HGU or enclaved.²¹(community member)

■ *Community of Pondok Damar finalise their demands from PT Mustika Sembuluh / Carlo Nainggolan*

We don't understand the point of the HCVs. The company tells us it is to stop community members from burning the land and destroying rare species. But shouldn't we be protecting these areas from the company rather than the community? They are the ones who are burning everything up. (community member)

Also, a large banyan tree that we use in our Hindu *keharingan* rituals was destroyed by PT Mustika Sembuluh when they cleared the land. Why was that not considered HCV? It matters to our culture and to our beliefs. (community member)

Many villagers are also worried about how their access to the HCV areas will be secured in the future.

For now, we can still access this land, even though our activities have been limited. But we fear that we will be tricked out of our land. How can we be sure that it will not be sold by the company? Is it even our land, or is it theirs? (community member)

The MoU between the communities and the company (the authors were unable to get a copy of this) reportedly contains clauses specifying that communities' access to the



■ HCV 4.2 in PT Mustika Sembuluh Estate 1 / Sophie Chao

HCV areas to fulfil their basic needs is not to be restricted. The fact that uncertainties remain for several community members over this point suggests that either the MoU has not been fully shared with the wider community, or that its terms have not been properly explained in the appropriate forms and languages, as required under Criterion 1.1 of the RSPO Principles and Criteria.²²

Whereas some community members were aware of the mapping of the HCVs, they reported that their participation was limited to being informed of the location of the HCVs based on GPS points identified by the consultants. While none objected to the location of the HCVs, they object to the process through which these have been identified, in other words, their lack of participation. None of the community members interviewed reported having been involved in the Social Impact Assessment (SIA) or Environmental Impact Assessment (EIA) carried out by the company, nor in participatory mapping activities.²³ No copies of maps or of the aforementioned documents have been made available to them.

With regards to representation, a notable degree of tension was apparent in terms

of who represented the community in interactions with the company. More specifically, community members were suspicious that the village head was not communicating information about the company or about agreements between the village head and the company, supposedly made on behalf of the community. In the words of Pak Yurias:

Maybe he attended *sosialisasi* events with the company, and with TUV [audit team]. We don't know. But we should know. The problems we are facing are those of a community. The pollution of our rivers by the company for example: it's not just the village head who is going to suffer from the consequences. All of us need water. Is he hiding behind the company? We don't know, but if he is, we just don't agree with it. (community member)

Some community members had heard of the TUV audit that was supposed to have included on-site visits to the villages within the PT Mustika Sembuluh concession. The village head and adat leader (*damang*)²⁴ were not present at any site visits that may have taken place and the village head reports not having received an invitation to attend. While the Assessment Agenda suggests that the TUV audit team visited the villages, this appears to be contradicted in their Audit Plan. First, it makes no mention of community visits; second, all interviewees cited are company representatives and;

third, where the only Public Consultation Meeting involving other stakeholders did take place, it was in Sampit, outside the concession. An examination of the list of stakeholders who attended this Public Consultation Meeting on 19th October 2009 reveals that only two community members from Pondok Damar were present. The list of stakeholders interviewed on-site does not contain any community members from villages within the concession. The NGO consortium only obtained confirmation that the TUV team had visited the villages from the village heads, whereas all other community members interviewed reported not having being involved.

Several community members expressed discontent over the lack of consideration given to their *adat* rights and land ownership:

We don't know what rules or laws PT Mustika Sembuluh is following. In any case, our *adat* laws are far more important than national laws. For sure, they are oral laws, but they have existed since time immemorial, we have lived by them for generations, and they govern the way we use this land. Our people have settled in this area since long ago, long before the company existed. And we have lived side by side with the company for quite some time. But how is it that they have the right to tell us how to use our land? (Ingging)

In addition, the community is confused by the lack of clear borders between Seruyan and East Kotawaringin, as this means they are not sure where to take their complaints, and in which district PT Mustika Sembuluh is accountable.

The boundaries are not clear. This is not only a problem for us, but also for the villages of Sembuluh I, Sembuluh II, Bangkal and Tembiku. If there are different laws in different districts, how do we know which one PT Mustika Sembuluh is subject to? (community member)

Of particular concern to the communities is the pollution of their rivers (Sungai Sundi, Sungai Tubeliang Tusang, Sungai Penda Enyu and Sungai Sampit) due to waste from the PT Mustika Sembuluh

mill, located around three kilometres from the village. Effluents from the mill caused severe contamination of the river in 2008 and again in 2012. While the company claims water samples show that the water at Pondok Damar is 'deemed to be good', community members were adamant that it was nearly impossible to find fish anymore, both for their own consumption and as a source of income, as formerly practised.²⁵

At the same time, Administration and Public Relations Manager of Wilmar's Central Kalimantan Project, Pak Riswantoro, stated in an interview that while the case of water pollution of 2008 was genuine (and that the company had taken significant measures to purify the water and provide compensation to the communities) the reported river pollution of 2012 was fake. However, the pollution of the water was recently confirmed by a water sampling by the Environmental Office which classified the pollution level of the water from one of the three rivers flowing through Pondok Damar (Penda Enyu) as of 'medium' threat. However, PT Mustika Sembuluh is not the only mill on this stretch of river, so it is unclear whether the pollution results from their activities or those of neighbouring concessions. The day before the NGO consortium visited Pondok Damar, community members had met with sub-district and company representatives to request that this issue be resolved, the last of a long series of appeals on this matter.

PT Mustika Sembuluh is a disease for us. Land conflicts continue. We are afraid of the police, and we don't want violence. At the same time, we don't understand the rules of this game. Take the water of our rivers. A lot of reports have been written about the pollution, but they have all been silenced. Who is paying them? (Village head, Pondok Damar)

We are drunk on the pollution in our rivers. The land is gone, the forest is gone, and the river is dirty. Burning is forbidden, wood has disappeared, the water is contaminated. We want to be informed. We want to stop being oppressed, colonised and ignorant. (Village head, Pondok Damar)

Women interviewed in the village also reported that the water from the river causes skin rashes and irritation. The company has taken measures to provide the communities with clean drinking water but not water for other uses, such as washing and cooking. As a result, community members have had to build their own water supply pools and wells at their own expense and collect rainwater outside the dry season. The women of Pondok Damar expressed particular concern about the lack of water for daily needs such as cooking and washing clothes (which they are responsible for in the household), and the health impacts on their children.

We have already been waiting for four years, and we will continue to wait. We will wait as long as it takes for the company to resolve the pollution of our waters. (community member)

The TUV audit states that PT Mustika Sembuluh was waiting for the village head to develop a budget plan for the payment of compensation for the contamination of the water. The village secretary of Pondok Damar stated that a budget was being developed with community members, but most community members interviewed appeared unaware of this and reported not having been consulted by the village head in this regard.

No community members had heard of FPIC and while some had heard of the RSPO, reactions were generally negative, with community members pointing out, in practice, participation and consultation had not been carried out properly, not to mention the right to say 'no' to the company's project. The lack of accuracy of the TUV report, of which relevant sections were translated during the interviews, was a particular source of discontent.

The RSPO is just theory, not practice. We should all be around the same roundtable, but we are not. Also, the auditors you mention are wrong, and the company is using them to make themselves look good. How much are they paying them? (community member)

Lack of information, communication and transparency were the main obstacles identified by the community of Pondok Damar. Many reported that it was difficult for them to access information from the company, despite numerous requests.²⁶

We have asked many times for maps and information on the HGU of the company, but we have not obtained them, and we have not been given reasons why we cannot access these documents. (Pak Robi)

A number of unfulfilled promises since an agreement signed on 22nd September 2008 between Pondok Damar and PT Mustika Sembuluh were also reported, including failure to provide electricity to Pondok Damar and illegal planting of oil palm close to the edges and within certain roads, as well as in rivers. The complete agreement of 2008 is as follows:

1. Gradual employment of Pondok Damar villagers in line with their education and competence.
2. The company is willing to remove the oil palms planted along the road connecting Pondok Damar and Tabiku villages and restore the road to its original condition.
3. The Company is willing to resolve the problem of graveyards planted over with oil palm.²⁷
4. The Company is willing to resolve the issue of waste polluting the river, and the company is willing to provide clean water facilities.²⁸
5. The problem of oil palm being planted too close to the river and the village road will be immediately resolved by the company and adjusted to prevailing regulations.
6. The Company is willing to build a Secondary School inside the plantation area
7. The Company is willing to maintain and protect the safety of the Pondok Damar village road.
8. The Company is willing to pay for the peace ceremony.
9. The Company is willing to pay for the ceremony of the cutting of the *hinting pali* (*terinting sawang*).

Four years on, the community renewed these same demands in June 2012 on the occasion of the *hinting* ritual, with further demands as follows:

1. 20% of the HGU to be allocated as plasma, in accordance with Ministry of Agriculture Law 26/2007, article 11.²⁹
2. Enclavement of around six ha of land belonging to Pondok Damar village.
3. Enclavement of the former location of Pondok Damar (Kampong Padas).
4. Re-negotiation of land conflicts in PT Mustika Sembuluh Estate 1 in the names of:
 - a. Rejo³⁰
 - b. Yamin³¹
 - c. Teriman
5. Gesoliasa and Ameliasti, as well as all other customary landowners in Pondok Damar.
6. Resolution of land conflicts in PT Mustika Sembuluh Estate 2 in the names of:
 - a. Mawan (deceased)
 - b. Ibit.
7. Capacity-building for the development of unused land owned by the community of Pondok Damar.
8. Provision of job opportunities.
9. Support for the development of fishery and animal husbandry.

Finally, the community was adamant that it would resolve ongoing conflicts in a peaceful, non-violent manner. Some did express their worries about BRIMOB (mobile brigade) and army personnel in the concession, questioning the legality behind their presence. An army representative interviewed at the *hinting* ritual affirmed that there was no army presence within PT Mustika Sembuluh and that it would be illegal for the company to hire either the military or BRIMOB in the concession. Contradictorily, confirmation was obtained directly from company representatives interviewed that military personnel were requested to enter the plantation by PT Mustika Sembuluh to supervise the plantation and ensure the security of company staff. A soldier carrying an M-16 rifle inside the concession was seen and

photographed by the NGO consortium on the first day of their visit within the concession.

Bangkal

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The village of Bangkal is located in the north-east of PT Mustika Sembuluh Estate 2 and covers 14,402 ha. Its population is of 2,096 individuals (or 639 households), 65% of whom are Dayak. It is said that Bangkal is the oldest village in the area, dating back over 150 years.

A striking feature of the interviews carried out in Bangkal was the discrepancy between the point of view of the village chief (a former employee of PT Mustika Sembuluh) and the community members. While community members reported that little to no information had been conveyed to them about the company's operations, the village chief affirmed that a complete FPIC process had been carried out.³² He also affirmed that copies of the SIA, EIA and various Standard Operational Procedures (SOPs) had been shared with him by the company, but did not show these to the NGO consortium, stating that he had not had time to look for them (three days after the NGOs first contacted him requesting to meet) and later that he could not find them (three days after the meeting). Community members chose not to join the meeting with the village chief and those who did join towards the end pretended they had never met us.

■ *Contradictory statements were obtained as to whether or not military personnel are hired by the company to supervise the concession / Sophie Chao*



The village head explained that a village team (*tim desa*) and a land clearing team had been created as part of the *sosialisasi* activities of PT Mustika Sembuluh early on in their interaction with Bangkal. He reported that several consultations had been held and that he had been invited to make inputs to the TUV audit in 2009.

All the issues were clearly explained to us, the process was good. I would say that it was 95% perfect. I say 95% because obviously there are always problems in concessions, that's just normal. It's more a question of balancing out the pros and cons.

Although he was reportedly involved in the process early on, the village head was unable to give an estimate of the area of Bangkal which is located inside the PT Mustika Sembuluh concession, or of the location of HCVs (a term he was unfamiliar with, including in bahasa Indonesian), or of the location of any enclaved lands. This was despite claiming to be fully involved in the company's social and environmental assessments.

The village head also affirmed that the company had played an important role in developing the village and providing social and infrastructural support. He is also reportedly involved in all activities of the company's Community Development (CD) program and states that he took part in participatory mapping activities (the NGO consortium were not able to see copies of these maps upon request but were told by the village head – and his wife – that 'they definitely exist.')

An interesting feature of the conversation with the village head was the fact that he was reluctant to side with the community whose interests he is expected to represent.

I used to be a small person, but now I am a big person. ... I am the government here. ... There are no problems – as the government representative here, I would know. ... I am not here to side with anyone or any group. I am neutral, in the middle. I just facilitate things for others.

According to the village head, 60 ha of plasma were in place and the plasma scheme had been fully socialised with the communities, along with a number of related SOPs. He also stated that the presence of PT Mustika Sembuluh was bringing a lot of jobs for the community of Bangkal, but was unable to give us an estimate of how many community members were employed by the company, even though he claimed that:

People only get jobs with the company if they get a recommendation from me. If not, they don't. All demands to the company pass through me, then to PT Mustika Sembuluh.

In terms of recommendations, the village head stated that the company needed to clarify the nature of the nuclear estate and smallholder scheme, as there are no written agreements for this yet.

The main thing is the management of the plasma and its development. The plasma scheme is what will develop the community and benefit their children. Otherwise, they are too lazy to work.

On a number of occasions, the village chief clarified that he was 'proud of what the company had done and was doing', and that no problems had ever been reported to him by the community of Bangkal, either in relation to land or any other matter. Curious as to what he meant by feeling proud of the company, he later explained that he had worked for PT Mustika Sembuluh for eight years, rising from the position of clearer to heavy machinery staff, and then became village head in 2008. On this basis, he claimed to be very well informed as to the process undertaken by the company to socialise their projects.

I used to work at PT Mustika Sembuluh, so I know that they have nothing to hide. If anyone, I would know. Their procedure is perfect.

However, interviews with community members revealed a very different picture. The overall impression given was that they had not been involved in consultations or *sosialisasi* with the company, and that

where their village head had been involved and informed, there had been a significant lack of communication with the wider community by the latter.

According to Pak James, a community member of Bangkal, the company approached the community and expressed their wishes for the development of oil palm, in what he described as a 'negotiation process'. Many complained of the lack of realisation of the promised plasma and noted that the lack of written agreements at the time was a problem they had come to realise in retrospect. No community member reported having seen the participatory maps, the HCVA and SIA or EIA, or the Environmental Impact Analysis (AMDAL), noting that these were probably with the village head. They report having contacted the company and the Environment Office as well as National Land Agency on several occasions to demand copies of these documents.

These documents still haven't been given to us by any of them. We are still waiting. Do we have to pay them to get them? (community member)

According to the company, all documents, including the SIA, EIA and HCVA can be accessed by stakeholders if they submit a written request to the company. No documents are distributed without a formal request in accordance with this procedure. However, as raised by several community members, if the communities are not aware a) that documents relevant to them exist in the first place (such as HCVA) and b) that documents are only distributed upon formal written request, it is highly doubtful that pro-active transparency is genuinely being implemented by the company.

A general feeling of discontent and resentment was conveyed by community members, who feel they were lied to by the company, including the promises of plasma and electricity. The community of Bangkal also resented the fact that promised employment has not been realised. PT Mustika Sembuluh reportedly verbally promised a rate of 75%

local employment at the early stages of *sosialisasi*, as a way to remedy the loss of the communities' forests and traditional livelihoods base. While the village chief suggested that plasma was the communities' main demand, a number of individuals interviewed stated that they 'never wanted them [the company] in the first place.'

Before the plantation, we had a better life. We could hunt deer and pigs in the forest. We were also able to access clean water for free. We were happy with our forest, our hunting and our fishing. The plasma scheme was encouraged, so we went with it, but we were only told the good things about oil palm, none of the bad things. Otherwise, we would have refused of course. It turns out it was all lies. All of the process with the company was about negotiating terms and deals, not about saying 'yes' or 'no'. (Pak James)

We are asking for plasma, but to be honest, we need plasma because our forest is gone, and all the land is in the control of the big palm oil companies, so our room to choose is limited. While we wait for our fallow lands to be usable again, we need jobs to meet our daily needs. (community member)

While the community members interviewed blamed the company for a number of these problems, they were also critical of the village head, suggesting that he was not representing their interests and failing to impart important information to the community. Certain individuals commented on the fact that he had worked for the company for several years, implying that he became village head with their support.

He rose within PT Mustika Sembuluh, and then he stopped working there when he became village head. Many strings were pulled. While he rose, others fell. (Pak James)

I could go to PT Mustika Sembuluh and get rich, for sure. That's the easy way. But if I did that, I would become a rich monkey (later explained by Pak James as losing one's dignity).

Community members reported not having been invited to the TUV consultation

meeting. One individual happened to be in Sampit at the time and found out about it by coincidence. He attended the meeting and made demands that land be returned to the community of Bangkal if the land conflicts were not resolved. He reported not having been given notes of the meeting but was concerned that his presence had been interpreted as consent.

I wrote down my name and contact details on a participant list, even though I was not invited. Does that mean the company now thinks I gave my consent? It's really unclear to me. Also, I walked out of that meeting in the end, but I'm sure that's not in the meeting notes, which I haven't seen. (Pak James)

According to the community, participatory mapping was not undertaken by the company, either of customary lands or of HCV sites. Sharing the experience of some of the other villages, community members described that the plantation was established on their religious (*keharingan*) sites without their consent, in what was described as a violation of their customary rights, which could only be resolved through a customary ritual.

On another note, according to community members, oil palm is also being planted illegally in a number of places, such as along national roads within less than five meters (these were shown to the NGO team in the field) and across certain roads and rivers.³³ One such road is that between Pondok Damar and Tembiku, built by the government in 1987 under the village development acceleration programme (*program pembangunan desa tertinggal*).

Are they allowed to do this? When they plant all the way up to the road, that leaves us no room to use that land. Some rivers have ceased to be because they are now full of oil palm. There are even roads that have been shut off because they have been planted with oil palm, such as the roads between Bangkal and Pondok Damar, and Pondok Damar and Tembiku. We used to use those roads all the time. Now, we have to use the company's roads. Do you know what that means? It means that we have to report to the

company every time we want to go somewhere. Some of us have even been refused access to our own homes. That is simply not done. Why do we have to report to the company when we want to do anything? It's the company that should be reporting to us. (Pak James, Bangkal village)

Land conflicts have also proliferated as a result of the process through which the company obtained the land in Bangkal. Because the company did not seek to find out who the land belonged to, and who it was inherited by, customary ownership and use rights were neglected. In a number of cases, the company signed land transfer agreements with one family member, while the rest of the family was not informed, even though they also had rights to that land. This in turn has created a deep sense of resentment and friction within families.

According to one community member, there are 2,000 ha of land which have been disputed since 2005 between the company and the community of Bangkal. Several efforts to solve the conflicts have been undertaken by the community. Recently, they sent a letter to the company expressing their grievances, and reported their case to local and provincial governments. The community have requested that the company follow their customary rituals as a means of conflict resolution which resonates with their culture and *adat* norms. So far, they have received no response from the company. Bangkal has also reported their case to the Indonesian National Human Rights Commission, which in turn made recommendations to the local authorities, but this has not had any significant impact on the conditions in the field for the community.

The main recommendation that emerged from the interviews was that consultations and the FPIC process cannot involve village heads alone, especially when these fail to socialise with the community they represent.

It can't be only in the hands of the village head and *adat* leaders. It has to be in everybody's

hands. Otherwise it breaks up the community itself. Of course we need information. Of course we want to be involved. (Pak James)

Tanah Putih

Our life depends on the land. Where else can we live? In the clouds? What are we without our land? (Pak Umbung)

The village of Tanah Putih is located in PT Mustika Sembuluh Estate 3. It covers 3,600 ha with a total population of 3,180 individuals (in 769 households), 82% of whom are Dayak. Other ethnic groups residing in Tanah Putih include Javanese and Batak. The village head reports that around 500 ha of the village's customary lands are within the PT Mustika Sembuluh concession.

At the time of the RSPO audit, non-compliance by PT Mustika Sembuluh was found in relation to Criterion 2.2³⁴ due to an ongoing land dispute since 2005 with two individuals, Tarang and Umbung from Tanah Putih over ancestral graveyards which were desecrated by the company during land clearing and development work. The audit verification states that a conflict resolution mechanism was agreed upon by the parties involved and on that basis, the non-compliance was considered

closed. The Tarang-Umbung cases are the only land conflicts identified in the PT Mustika Sembuluh concession by TUV in its certification audit. Part of the interviews therefore sought to find out whether the conflict resolution mechanism had been successful in resolving the conflict, as this was the justification upon which the non-conformity was closed.

Grave concerns —

In 2003, the ancestral graves of Tarang and Umbung were destroyed by company workers clearing the land for the construction of a road. Neither were informed beforehand that this would take place. Pak Umbung states:

We were not told anything about the construction of this road. They just bulldozed right through our graves. Now, the ancestors rest beside the road. Everyday, they are visited by trucks of fresh fruit bunches. If we had not fought for our ground on this case, they would be run over by the trucks a hundred times a day. How is that acceptable?

The Tarang-Umbung case was taken to the customary court in September 2008 where it was ruled that compensation would be of 64 million rupiah for Umbung and 25 million

■ *Ancestral graves beside company road / Sophie Chao*



rupiah for Tarang. Both rejected the stated amounts as inadequate, demanding 1 billion rupiah (Umbung) and 750 million rupiah (Tarang). They also lodged a report against the company to the district police department. Later, another round of negotiations took place in the presence of local NGOs Save Our Borneo and WALHI Kalteng and the affected parties changed their demand to seven pieces of Melawen plates³⁵ (Umbung) and three pieces of Melawen plates (Tarang), later reverting to the equivalent in monetary compensation. A documented mechanism towards resolution was accepted and signed by the company, Tarang and Umbung on 6th November 2009 (copies were shown to the assessment team). However, three years on, the compensation amount has not been agreed to by the company as it is said to be ‘unrealistic’.

According to Pak Umbung, the ancestral graves cannot be measured in terms of monetary value:

We asked for the Melawen plates to show how much our graves mean to us. The value of our *adat* graves depends on our *adat* rules. They demand respect and care. The Melawen plates were a way to express that. Also, the company ignored our plea for over three years after the desecration. They need to pay for that as well, because three years is a long time to suffer for us, and for our ancestors.

After several unsuccessful meetings at the level of the sub-district, district and provincial government, Umbung and Tarang recently appealed to the Indonesian National Human Rights Commission (Komnas HAM) for support. Komnas HAM accepted to act as facilitator in the resolution of the conflict, but the communities report that PT Mustika Sembuluh has not agreed to this process and the situation is at a stalemate as a result.³⁶ They are now uncertain as to the next step to take, as they do not feel confident to opt for formal court proceedings due to lack of knowledge of legal procedures:

We lack education – we don’t know how formal courts work, and no one has told us or socialised

this to us. This is advice coming from far away to our village. We don’t know what step to take next. (Mas Bibin, son of Pak Umbung)

A major concern for the communities was the fact that the company has been certified despite the fact that ongoing land conflicts have not been resolved. The fact that the RSPO P&C do not explicitly require conflict resolution but rather the existence of conflict resolution processes implemented and accepted by the parties involved,³⁷ was identified as a limitation of the P&Cs as they stand.³⁸

It’s not enough that there is a mechanism in place. What matters is that the mechanism is effective. Also, the mechanism might be accepted by our leaders, but not by the rest of the community, so we have to be really careful when we talk about a mutually accepted mechanism. In some ways, this makes things easier for the company, because as long as they show they are making efforts towards resolving conflicts (genuinely or not), it is taken as a positive sign and enough to get certification. (Pak Umbung)

FPIC process —

Interviews with community members revealed not only that the Tarang-Umbung case is still ongoing (three years after the TUV audit) but that there are also numerous other ongoing land conflicts which were not mentioned in the TUV report.³⁹

One community member, Pak Mengong, explained that the company did not give him any choice with regards to the releasing of his land. He is still waiting for compensation, as the compensation offered by the company was not satisfactory to him, but doubts that he will obtain it, as the company started planting oil palm on his land immediately after the release.

I lost around half of my land back then, and I had no real choice. The land was *ladang* [rotational agricultural land], but also rubber gardens, rattan and vegetable plots, and fruit trees. Straight after, the company started to plant. I did not agree to the compensation then, and I do not agree with it now.

Another two individuals reported that their land had also been taken by the company without their consent (Pak Luhang Jaga and Pak Wil Mabigi⁴⁰), and it was reported that these were only some of many similar cases in the village. Several community members are still waiting for compensation for the land they released to the company. Others want their land back, not compensation:

These lands were lost without our consent because we didn't get enough information. These are *adat* lands: our rights to it must be returned, not compensation. (community member)

Community members are also confused as to the meaning, area and location of both HCVs and enclaved land.

We can't tell the difference between HCVs and enclaved land, because it seems like all the HCVs are in enclaved land. (community member)

We don't know where the HCVs are unless we happen to come across the signs that mark them out. And we don't understand why our gardens are sometimes marked as HCV. Why put HCVs on the land we own? What does that mean in terms of our access and right to own those lands? (community member)

Community members also questioned why their ancestral graves were not marked as HCVs, as they were of important cultural value.

Some of our graves (*sandung*) are over 100 years old. Why are they not considered as HCVs? One of them is marked by an ancestral tree. It is surrounded by oil palm. (community member) (note: the NGO assessment team was taken to visit the aforementioned site).

Although there is a list of enclaved land available, community members stated that they were unclear where their enclaved land was, and that they had received less than they had asked for.

We suspect that some of the enclaved land is being planted with oil palm, but we can't be sure because we don't know exactly where this

enclaved land is. But surely we should be the ones who decide where the enclave should be? Also, most of us got less than we asked for. Those who asked for five ha got two. Those who asked for two got one. (Tarang)

The village head (also the former village Secretary) shared his recommendations regarding HCVs as follows:

One of the main grievances of the community was that the presence of the company had not brought any particular benefits in terms of economic development for the village. In particular, the lack of realisation of plasma schemes and of employment was resented. Many reported that they were not offered plasma schemes by the company in the first place.

You can count the number of people from our village who managed to get work at the company on the fingers on your hand. They bring in people from outside and tell us that we don't know how to take care of the oil palms. (Tarang)

They think we are stupid country people, and the only thing we can do is pick the remainder of the fallen fruit to sell. They think we are stupid, because we don't have a proper education. It's true we don't, but who is not able to pick fruit? (community member)

Significant concern was expressed over the fact that the company has blocked both roads and rivers by planting oil palm, thereby limiting the communities' access to both. An example was a 23 km road linking Tanah Putih to Bangkal, which was built in 1997, which is now blocked by oil palm. The borders of the concession itself also remain unclear to most, as no maps were made available to them (including the village head). No copies of the SIA, EIA or HCVA were available to them either.

The limited access to employment and the physical blocking of used roads and rivers was described as restricting the development and wellbeing of the village, which community members say is 'neglected' (*terlantar*) and 'left behind' (*ketinggalan*).

We thought economic benefits would come from the company's arrival, but all we face are hindrances. We are not free anymore in our movements. (community member)

We used the river everyday for trade and for transport. But now the boats cannot cross, and we have to use company roads to get anywhere. (village head, Tanah Putih)

Lack of clear and complete information from the company was blamed for a lot of the problems faced by the community. Some reported that it was only after problems emerged that they were given information or relevant documents.

We want our rivers and access to the roads back now. For now, we are just floating in a kind of unclear middle ground. We don't want to be observers of our own fate. And these are not recommendations or suggestions. They are demands.⁴¹ (community member)

Customary rights and FPIC: The role of the government and the company

The government

The NGO consortium carried out interviews with representatives of the Plantations Office (Disbun), the Environmental Office (BLH) and the Forestry Office (Dishut) in Sampit, in relation to PT Mustika Sembuluh's operations. One of the major findings from these interviews was that there is a significant lack of coordination and communication between relevant government bodies. Several reported not being informed in time (or at all) regarding the company's operations and projected activities. The Forestry Office representatives noted that they had not been significantly involved in the early years of PT Mustika Sembuluh's operations in the area, or in the opening of the concession. Few of the representatives interviewed had heard of the RSPO, or knew that PT Mustika Sembuluh had recently been certified, or what this certification entailed. The right to FPIC was unknown to all, as

was the relevance of international human rights law and the RSPO as the contextual framework for FPIC.

The Plantations Office representatives reported encountering a number of obstacles in conducting their work to ensure the full legality of the licensing process in accordance with national legislation and local regulations. One of these relates to the recent division resulting from Law No.5 of 2012⁴² of the district of East Kotawaringin into separate districts: Kotawaringin Timur, Katingan and Seruyan. A consequence of this change has been that the local government of East Kotawaringin finds itself with restricted scope to monitor the operations and licenses of oil palm companies, and faces problems of coordination with other governmental bodies both within East Kotawaringin and with Seruyan. The fact that the concession of PT Mustika Sembuluh stretches over two districts (Seruyan and Kotawaringin) was reported as a complicating factor as it is often unclear which district's government bodies should be, or are, involved, in the monitoring of the company's activities and the follow-up of complaints and conflicts.

Not only are the roles of each government body unclear, the allocation of responsibility for each district is also unclear (Plantation Office representative).

Not all government bodies appear to have been involved in all the stages of the licensing process of PT Mustika Sembuluh. The Forestry Office, for example, was only involved in the early stages when they made recommendations regarding the location and status of the land to be acquired and the allocation of the *izin prinsip*. The Plantations Office was involved in the allocation of permits but is not in communication with the company with regards to its operations and plantings. One result of this lack of continuity across different government bodies' involvement has been lack of due supervision, monitoring and oversight of the company's operations, as admitted by the government representatives themselves. With regard to the legal procedures of obtaining permission

to clear land, government representatives from the Forestry Office noted that most companies begin planting prior to receiving all necessary permits (often only with an *izin prinsip*) as the process tends to be time consuming (up to three years) and costly.

Even though they are not allowed to, they often plant before getting all the permits, because they see that waiting for the permits means loss of revenue from the land (Forestry Office representative).

In terms of environmental standards, BLH categorises PT Mustika Sembuluh as a 'blue category' company, meaning that it is relatively in line with the legal requirements (the scale being gold, green, blue, red and black categories). However, they confirmed that two cases of water pollution had been reported against the company in 2008 and early 2012. Neither the Forestry Office nor the Environment Agency were aware of the meaning of HCVs. Furthermore, it was reported that, as with many other oil palm companies, some Environmental and Social Impact Assessments had only been carried out after planting had taken place ('sometimes even when the oil palm trees begin to bear fruit').

PT Mustika Sembuluh

The company representatives interviewed acknowledged fully that the lands on which the concession is located are customary lands and that the company are the newcomers. In line with PT Mustika Sembuluh's commitment to transparency of company information, as stated in their management letter of 16th March 2009, the NGO consortium was able to view and photocopy some documents upon request. These included the HCVA, the HCV Management Plan 2011 – 2012, the SIA, a number of SOPs and maps of customary lands. Company policies are also clearly posted in the Regional Office (including Social, Environmental, and Corporate Social Responsibility Policies). However, no community

members interviewed had obtained or seen copies of these documents, and it is not company policy to automatically provide copies of documents to the communities (these are obtained only upon request). One village head reported having copies of the documents, but did not show them to the NGO consortium. Several community members complained that information was not being conveyed to them in good time, if at all, and that they lacked knowledge to make informed decisions as a result.

While the company has taken a number of measures to remedy the non-conformances identified by TUV in their audit of 2009, such as the development of SOPs and further negotiations with Tarang and Umbung over the grave conflict, findings from the field suggest that these have so far largely failed to improve the FPIC process in the eyes of local communities, whose representation is limited and often undermined by the village heads. Important documents, such as SIAs, SOPs (for Guidance for Land Acquisition, for Recognition of Traditional or Customary Rights of the Community) and maps of HCVs exist, but have not been provided to local communities. The participation of communities in the production of such documents also appears to be highly limited. A number of land conflicts have yet to be resolved three years on from the certification of PT Mustika Sembuluh, only a small minority of which may be said to be based on opportunistic claims from certain community members. The basic needs of at least one community in relation to water access and transport are significantly limited by the activities of the company. Finally, opportunities to benefit from the plantation development for local communities have been either limited or unfulfilled, leading to a number of collective acts of protest.

While the TUV audit of 2009 identified two ongoing land disputes (one of which they claim was successfully resolved), field findings suggested that there are many more ongoing cases. While a conflict resolution

mechanism has been set up by the company in a participatory manner, it appears to have been developed with the village heads only, leading community members to question its validity and usefulness, given that some conflicts have been ongoing since 2007. The case of Tarang and Umbung, having failed to be successfully resolved through the conflict resolution mechanism, has now been taken by the community to the Indonesian National Human Rights Commission (KOMNASHAM), but the company has refused Komnas HAM's mediation, preferring to continue dialogue and negotiation with the individuals concerned directly.

As such, it can be said that the conflict resolution mechanism has not succeeded in resolving this conflict, and that parties involved have not yet mutually agreed on an alternative channel. With regards to compensation, the company has established a mechanism for the identification, calculation and compensation of loss of legal or customary rights of land, but this is not accepted by all parties. Several community members are still waiting for compensation for land lost. However, the company has taken steps to develop MoUs (around 80) with individual community members in order to secure their customary rights within the concession. A village team (*tim desa*) has also been set up, facilitated by the company, and including community members and representatives, to socialise the activities of the company and to identify emerging land conflicts.

The company has identified and clearly marked out HCVs within the concession and developed an HCV Management Plan for 2011 – 2012. Posters of wildlife and endangered species are also put up along major roads (these were seen in Estate I only). However, explanations of the concept and purpose of HCVs with local communities (especially of HCV5 and HCV6) has been very limited. Most communities are unclear as to how their rights and access to HCV5 and HCV6 areas will be secured on the long-term. Furthermore, based on

the responses of company representatives, the difference between enclaved land and HCVs is ambiguous; from their explanations, it appears that a number of HCVs are in fact located in enclaved land. Community members themselves are largely unable to differentiate the two. Furthermore, certain areas critical to local communities' traditional cultural identity (such as ancestral graves) were planted or surrounded by oil palm prior to mapping, causing concern among community members as to how they will be protected in the case of further oil palm development. A number of areas have been enclaved for local communities, but in most cases the areas of these enclaves were smaller than that requested.

Finally, the pollution of rivers affecting Pondok Damar has yet to be resolved. While drinkable water has been provided for the community, they are still waiting for access to water for other daily needs (including washing and cooking) and are resorting to buying water and collecting rainwater instead. Many have had to dig wells at their own cost as a result of the pollution. It is to be hoped that the agreement signed on 27th June between the community, the company and the sub-district, will bring a speedy resolution to this urgent matter.

Identified legal inconsistencies

A number of legal inconsistencies were identified throughout the course of the field investigation. First, the legality of the company's operations is questionable in terms of land clearing prior to obtaining the HGU. The TUV audit is contradictory in its statements on this issue. On the one hand, it states that:

Approval of these HGU titles is in progress (as verified from letter received from the National Land Agency on June 15, 2009). *The company has already planted on the area of 6,188.804 ha, for which the HGU for this area is still pending approval from the local government, however this is not illegal as the company already has their*



location permit for this area and is permitted to begin operations while awaiting for HGU approval for this area. (emphasis added)

■ Meeting with company representatives at Regional Office of PT Mustika Sembuluh / Carlo Nainggolan

On the other hand, it states that:

The company only develops land on which they have the required land use titles (HGUs).

The company was somewhat unclear in this regard, stating that on the one hand, economic benefit came first, but also that the company would always ‘follow the rules’.

Secondly, while plasma has been promised to the communities, only 182 ha have been allocated out of 3,890 ha to be allocated in accordance with the minimum of 20% of the total HGU under Agricultural Minister Regulation 26/2007.⁴³ This is causing significant stress for the community members involved, as they are unclear as to when the promise from the company will be fulfilled. Violation of the ministerial regulation by PT Mustika Sembuluh prompted thousands of people in Seruyan District to take their grievances to the office of the *Bupati* of Seruyan to demand that the government press the company to realise this requirement. From information obtained from government agencies and local communities, PT Mustika is far from the only oil palm company operating

in Kotawaringin Timur and Seruyan districts that has failed to comply with this requirement.

In response to the communities’ complaints, the Bupati of Seruyan stated that as PT Mustika Sembuluh had received its Plantation Business Permit (IUP) prior to 2007, the Minister of Agriculture’s Regulation 26/2007 was not applicable. A similar statement was also made by the head of the provincial plantation office, Erman P. Ranan. However, paragraph 2 Article 42 of the Chapter on Transition in the Agriculture Minister’s Regulation 26/2007 stipulates that:

1. Plantation Business Permit (IUP) or Plantation Business Registration Letters (SPUP) that have been issued prior to this regulation are still deemed valid.
2. Plantation companies that already have the permit or the Plantation Business Registration Letter as referred to in paragraph (1) in the implementation of the plantation business must abide by this Regulation.

Paragraph 2 clearly specifies that plantation companies that hold a permit or a Plantation

Business Registration Letter must abide by this law and PT Mustika Sembuluh, as a company holding such permits, is also bound by this regulation.

Thirdly, community members in Pondok Damar are concerned about the planting of oil palm along the edges of rivers, in contravention of the Decision of the President of the Republic of Indonesia Number 32/1990 on Management of Protected Areas, Article 16(a). In accordance with Forestry Law 41/99 article 50 paragraph 3(c), the felling of trees is prohibited within a radius or distance of:

- 500 meters from the edge of a reservoir or lake;
- 200 meters from the edge of springs and from the banks of rivers alongside swamps;
- 100 meters from river banks;
- 50 meters from banks of streams

Local communities claim that this significantly limits the area of land that they can make use of for their own needs.

■ *The planting of oil palm within 100 meters of the river was witnessed at Sungai Sampit (S 02°35'19.7" – E 112°32'54.5")*

Fourthly, significant discontent is also voiced by a majority of community members over the fact that priority of employment is not given to community members but to outsiders. It would thus appear that the company is failing to give local communities opportunities to benefit from the plantation development. In certain cases, communities feel they are being restricted in their movements and development opportunities due to the blocking up of rivers and roads with newly planted oil palm, leading to transport being restricted to company roads.

Oil palm companies operating in Indonesia are required to provide jobs and improve local incomes, in line with Law 18 of 2004 regarding Plantations, Article 3:

Plantations are organized [sic] with the purpose:

- a. to increase people's income;
- b. to increase state revenues;
- c. to increase state hard currency revenues;
- d. to provide jobs;
- e. to increase productivity, added value, and competitiveness;
- f. to meet the consumption needs and raw materials for domestic industries; and
- g. to optimize natural resource management in a sustainable manner. (emphasis added)



While the law itself does not say anything about the company having to prioritise local communities per se, the needs of local communities also need to be accommodated by the company. The situation in PT Mustika Sembuluh is one where a majority of staff and workers are brought in from outside the local area, causing local discontent and contributing to a certain degree of inter-ethnic tension.

Finally, there are also indications that BRIMOB is operating within the concession (community statements and sighting in Estate 3). Community members report seeing them regularly, and the company itself admitted hiring Safety Apparatus (which could be the police or the army) to ensure the security of the concession. However, an army representative interviewed at the protest assured the NGO consortium that this was not the case, and that it would be illegal to do so.

Recommendations

Recommendations from local communities

Recommendations from the local communities of Pondok Damar, Bangkal and Tanah Putih were as follow:

1. Implementation of the agreement between PT Mustika Sembuluh and Pondok Damar of 1st January 2012 over pollution of local water supplies by mill effluents in 2008 and again in 2012.
2. Compensation for land taken from Pondok Damar without prior consultation.
3. Provision of job opportunities with PT Mustika Sembuluh on a permanent and regular basis, with priority given to local communities.
4. Information sharing by the company on the legal status of its operations, the lease agreement and duration and the legal status of the land within the concession after the expiry of the lease.
5. Further *sosialisasi* on the meaning and purpose of HCVs to local communities, as well as joint identification of further HCV sites considered by the communities as of high cultural and social value (including graves and sacred trees).
6. Enclavement of six ha of land in Pondok Damar for communal village use.
7. Enclavement of the former location of Pondok Damar village (Padas village).
8. Resolution of all ongoing land conflicts, including but not limited to the cases of community members Rejo, Jamin, Teriman, Gesoliasa, Ameliasti (Estate 1) and Mawan (Almarhum) and Ibit CS (Estate 2).
9. Implementation of plasma scheme with due information-sharing by the company on its implications, terms and conditions to community members interested in joining the scheme.
10. Negotiations with the company over the blocking of roads and rivers with planted oil palm.
11. Provision of all relevant documents to community members, including HCVA, SIA, information on the company's acquired HGUs, AMDAL and available maps.

Recommendations from government bodies

The main recommendation from the government representatives interviewed (Environment Office, Plantations Office and Forestry Office of East Kotawaringin) was for the roles, responsibilities and mandates of each institution to be clarified with regards to the monitoring and supervision of oil palm investments and operations. A clarification of this within East Kotawaringin, and in relation to the new district of Seruyan, was pointed out as essential to avoid loopholes for the companies and to improve the oversight of company operations by the government, particularly when these overlap more than one district, as is the case for PT Mustika Sembuluh

Recommendations from PT Mustika Sembuluh

PT Mustika Sembuluh staff informed the NGO consortium that they had recently discussed inputs and recommendations for the RSPO P&C review, and advised the NGO consortium to contact higher level staff to access these recommendations. However, the NGOs were unable to receive this information from staff contacted. A few recommendations were however made by staff interviewed at the estate, as follow:

1. HCVs to be recognised in law by relevant government bodies and not treated as neglected or degraded lands, so as to ensure that their management becomes the responsibility of the State as well as companies.
2. Government bodies to improve communication with private sector companies in relation to law and legal reforms, so that companies are informed in good time of changing regulations and can implement them in good time.
3. Better law enforcement on the part of the government and more clarity in terms of the specific mandates and responsibilities of different government bodies (eg National Land Agency, Environment Office, Forestry Office, Plantations Office) in both Seruyan and East Kotawaringin.

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Wilmar International *CSR Tribune* December 2010, Issue 4. Available at <http://www.wilmar-international.com/sustainability/resources/WilmarCSRtribune4.pdf>

Endnotes

1. RSPO 2009; TUV Rheinland 2009.
2. Wilmar International *CSR Tribune* December 2010. Note: Wilmar International has committed to achieving RSPO certification for all units in which it has at least a 51% share in Indonesia by 2013.
3. McKinnon 1996.
4. Casson 2001
5. Persoon & Osseweijer 2008: 69 – 119.
6. RSPO 2011: 3.

7. Mongabay 2012; Jakarta Post 2012. Note: According to a Ministry of Forestry review, 'of 325 plantation companies in Central Kalimantan, 282 were suspected of 'non-procedural' forest use.' (EIA/Telapak 2011).
8. Central Kalimantan Province Tourism and Culture Board 2001.
9. District Government East Kotawaringin website (nd).
10. Sercombe & Sellato 2007: 21 – 22.
11. The name Dayak, carrying the meaning of 'upriver (people)' is frequently used by outsiders to refer to non-Muslim tribal groups. There are hundreds of Dayak groups across Borneo, each with their own ethnonyms, languages and cultural traditions (Sercombe & Sellato 2007).
12. Sevin 1983.
13. Kingsbury & Aveling 2003; Cahyono 2008.
14. Monografi Statistik Pondok Damar, Tanah Putih and Bangkal 2009.
15. The NGO consortium contacted Aksenta several times to arrange a meeting to discuss the findings of the Social Impact Assessment carried out by them for PT Mustika Sembuluh but received no response.
16. Cleary & Eaton 1992: 17 – 18.
17. Ibid.: 89 – 113.
18. The term *sosialisasi* is frequently used by palm oil companies to describe consultation with local communities, during which information pertaining to the development of plantations is shared. The term is used throughout the studies carried out in Indonesia to make clear the differences between this process and the process required to fully and adequately respect the right to FPIC, which, as it is shown, differs in many ways from the requirements and nature of *sosialisasi*.
19. Dinas Perkebunan Provinsi Kalimantan Tengah: *Perkembangan Usaha Perkebunan Besar Provinsi Kalimantan Tengah.* 31st December 2011.
20. On this point, the company reports that while they are open to providing employment opportunities to local community members, the communities have shown little interest in working as labourers, favouring instead employment as security guards, drivers, factory workers and operators. The company reports that where local community members have been employed as fruit transport contractors, their performance did not match the specifications or requirements of the company.
21. The TUV audit states that awareness of the importance of HCVs is achieved through the putting up of wildlife posters in public areas such as housing sites, offices, main roads and the surrounding villages of Pondok Damar, Tanah Putih and Bangkal. While posters were seen by the main roads in PT MS 1, they were not seen any of the villages within the concession.
22. Criterion 1.1: Oil palm growers and millers provide adequate information to other stakeholders on environmental, social and legal issues relevant to RSPO Criteria, in appropriate

- languages & forms to allow for effective participation in decision making.
23. The TUV audit of Mustika Sembuluh states that the company undertook corrective action to the identified non-conformance with Criterion 2.3 and that 'traditional right[s] such as enclave areas owned by local communities have already been identified and marked on GIS maps' (p.45).
 24. *Damang* are village level institutions introduced at the end of the 19th century by the Dutch through which they administered the area. *Damang* are now accepted as the customary authorities.
 25. The TUV audit states that some people interviewed continued to fish in the streams to supplement their daily needs, but this refers to statements from company workers only, although a few community members are employed as well.
 26. A copy of the company's SOP on Transparency (No.47/PR/(2)/0312) is posted in the company offices in the plantation, in English.
 27. The company has already provided compensation in the amount of 500 million rupiah for 46 graves in 2010 in Pondok Damar. It is unclear how many further graves have been either destroyed or planted over with oil palm.
 28. The company reports that it has already given advice to the community on how to preserve water purity but that the community has not taken the necessary steps to do this.
 29. The company reports that 183 ha out of the 250 planned ha have been allocated to date in Pondok Damar.
 30. The company reports that Rejo's claim over nine ha overlaps with the land of 25 individuals in Pondok Damar and thus the claim was rejected on 8th May 2012 on that basis.
 31. The company reports that Yamin's claim over 50 ha in total overlaps with the land of 17 individuals in Pondok Damar and thus the claim was rejected on 8th May 2012 on that basis.
 32. The village chief appeared highly reluctant and defensive in the interview, questioning the validity of the NGOs observation activity and demanding evidence of ID after the purpose of the assessment was explained to him. He also repeatedly stated that he 'knew what NGOs like [you] are looking for and trying to do' and that there were 'no problems at all for [you] to dig out between the company and Bangkal'.
 33. In a previous field investigation carried out in 2011 in PT Mustika Sembuluh, Wilmar noted there was no such requirement under national, provincial or district laws and regulations (see Colchester *et al.* 2012).
 34. Criterion 2.2: The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights.
 35. Melawen plates were explained to the NGO consortium as antique objects dating back to the Majapahit empire in Java (AD 1293 - circa 1500) by the communities and by the TUV auditors.
 36. Company representatives interviewed reported that they prefer to hold further meetings with the community of Pondok Damar to engage in dialogue rather than resort to mediation by Komnas HAM.
 37. Criterion 6.3: There is a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties.
 38. This point was emphasised by the TUV auditors interviewed, who stressed that the certification of a company is based on the existence of a mutually agreed conflict resolution process, and not its outcomes, as they can take years to materialise.
 39. The NGO consortium met with the lead auditors of PT Rea Kaltim, Dian Soeminta and Fadli, of TUV Rheinland in Bogor on 17th July 2012. During the meeting, the auditors explained that over 40 land conflicts were recorded at the time of the audit, but that all of them had been resolved except for the Tarang-Umbung cases.
 40. The company reports that Luhang Jaga's claim to four ha of land in Blok D27TU – D28TU was rejected on 28th Feb 2011 by the company because it overlapped with land which 18 other individuals had already been compensated for. This, and the cases mentioned earlier of overlapping claims, suggests the possibility, as raised by several community members, that certain individuals (either from within or outside the villages) are making spurious claims to land and receiving compensation from the company. Had participatory mapping with the full involvement of local communities to identify rights over land been carried out earlier on by the company, this complication may have been significantly reduced or avoided.
 41. In the stakeholder consultation meeting held on 19th October 2009 by TUV as part of the RSPO audit of PT Mustika Sembuluh, the issue of lack of plasma opportunities for communities was raised. The management response was that 'the suggestion was noted'. This issue was not investigated in the ensuing audit verification because it was deemed that 'this is a positive comment' (TUV Audit, p.54).
 42. Undang-Undang Republik Indonesia Nomor 5 Tahun 2012 Tentang Pembentukan Katingan, Kabupaten Seruyan, Kabupaten Sukamara, Kabupaten Lamandau, Kabupaten Gunung Mas, Kabupaten Pulang Pisau, Kabupaten Murung Raya, dan Kabupaten Barito Timur di Provinsi Kalimantan Tengah.
 43. According to Agricultural Minister Regulation 26/2007 Article 11 paragraph 1 'Plantation companies who have an IUP or IUP-B are required to build plantations for the surrounding communities at a minimum of 20% from the total plantation area exploited by the company'. The total area under HGU of PT Mustika Sembuluh is 19,450.264 ha. Plasma should account for 3,890.053 ha of this total area according to this regulation.

PT Permata Hijau Pasaman I and the Kapa and Sasak peoples of Pasaman Barat, West Sumatra

4

Patrick Anderson, Fatilda Hasibuan, Asep Yunan Firdaus, Afrizal, Zulkifli and Nurul Firmansyah



Introduction

PT Permata Hijau Pasaman I¹ (PT PHP I) is a member of the Wilmar group, which joined the RSPO in 2005. This concession was selected as one of seven study areas in Indonesia due to a range of factors, including the availability of academic expertise and existing studies, contacts with a local NGO partner and a local organiser, and expressed concerns by affected communities about the land acquisition process. The main issues identified in the field study are: unresolved disputes with the impacted Kapa communities that date back to the time when the government obtained release of their lands; ongoing disputes with regards to the failure of the government and company to involve all rights-holders in the land acquisition process and; disputes over the plasma areas. Also identified in the study are legal questions concerning the commencement of land clearance and planting before PT PHP I obtained environmental and land

■ *Gateway to PT PHP I concession. The Nagari Kapa village of Talao Pagang is surrounded by the concession and villagers must pass by this gate to enter or leave their village.*

use licenses (AMDAL and HGU). PT PHP I is yet to be certified by the RSPO, and is currently planning to conduct High Conservation Value (HCV) assessments and fulfil other RSPO requirements before being assessed for certification.

Area in question

The concession of PT PHP I is located in the district of Pasaman Barat, West Sumatra, on the western coast of the island of Sumatra. The size of the company plantation in Pasaman Barat district is of 1,600 ha.² The area is composed of swamp lands which were cleared and drained at the beginning of the operations. Areas of farm land were also included in the concession. The concession

is close to the coast, and includes mangrove forests and wetlands on peat soils. The drainage of these areas and agricultural run-off from the plantations have caused significant impacts on the adjacent swamps, leading to loss of livelihoods for Kapa families who used to harvest fish, crabs and shrimp from these areas.

West Sumatra covers an area of 42,130.82 km². Geographic features of the region include plains, mountainous volcanic highlands formed by the Barisan mountain range that runs from north-west to south-

east, and an offshore island archipelago called the Mentawai Islands. The province borders North Sumatra, Riau and Jambi to the east and Bengkulu to the south-east. It includes large areas of dense tropical forest, home to a host of species including *Rafflesia arnoldii* (the world's largest flower), the Sumatran tiger, the Malayan tapir and the Bornean clouded leopard. Two national parks are also located in the province: Siberut National Park and Kerinci Seblat National Park. West Sumatra is one of the earthquake prone areas in Indonesia, due to its location on the tectonic slab at the confluence of two major continental plates (the Eurasian plate and the Indo-Australian plate) and the Great Sumatran Fault.

■ Map of West Sumatra

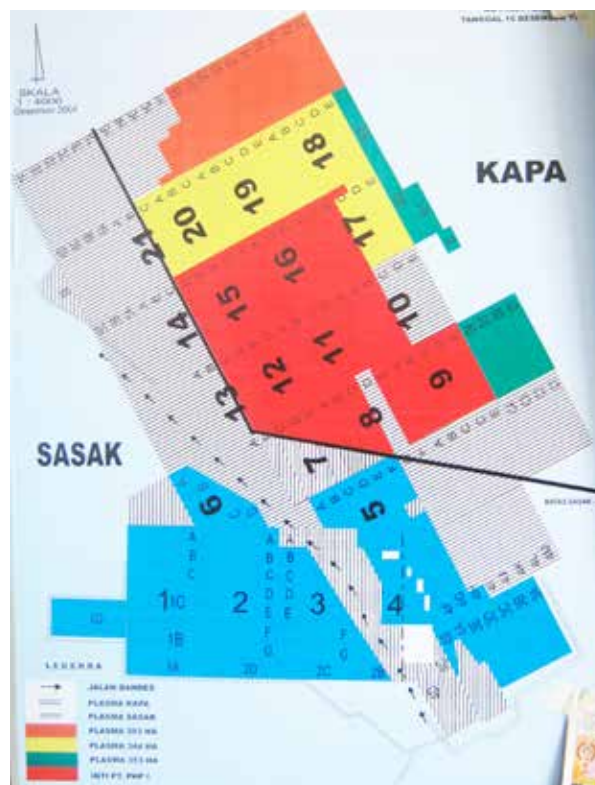


Company Profile

Established in 1992, PT PHP was initially a domestic investment enterprise with shares owned by its founders. In 1999, the company's legal status was changed to Foreign Investment Enterprise (PMA) and its shareholders became foreign entities: Keyflow Limited (British Virgin Islands), Caffrey International Limited (UK), HPR Investment Limited (British Virgin Islands), Banoto Investment Limited (British Virgin Islands), Wilmar Plantation Limited (British Virgin Islands) and PT Kartika Prima Vegetable. The latter's shares were subsequently sold to PT Karya Prajona Nelayan.³

Since it first became involved in the oil palm plantation business in mid-1992, PT PHP has obtained several licenses for concessions, issued by the relevant government authorities. The first one was for a 12,000 ha oil palm plantation concession in *Nagari*⁴ Sasak, Pasaman sub-district, based on the land allocation (*pencadangan lahan*) recommendation of the Regent of Pasaman and the Governor of West Sumatra. In 1995, again with the recommendation of the Regent of Pasaman and the Governor of West Sumatra, the company was granted a permit to set up another 4,000 ha of oil palm plantations in *Nagari* Sikiliang, Pasaman sub-district. Lastly, in 1998, PT PHP re-submitted two proposals for the establishment of a 1,600 ha plantation in *Nagari* Kapa and a 3,500 ha plantation in *Nagari* Maligi, both of which were approved by the Regent of Pasaman.

PT PHP and associated companies hold oil palm plantations and integrated Crude Palm Oil (CPO) and palm kernel oil processing units. Its production capacity is 135,250 tonnes of Fresh Fruit Bunch (FFB) a year, 28,600 tonnes of CPO a year and 6,900 tonnes of palm kernel oil a year. 25% (or 7,150 tonnes a year) of CPO produced by the company goes to the domestic market and 75% (or 21,450 tonnes a year) to the international market. The percentage breakdown is the same for palm oil kernel, with figures of 1,725 tonnes



■ Map of nuclear (*inti*) and plasma estates within the concession of PT PHP I

a year and 5,175 tonnes a year respectively. The total investment of the company is of 42,902,000,000 rupiah (or 4,457,350 USD). The capital source derives from loans (36,773,000,000 rupiah or 3,820,571 USD) and from the company's own capital (6,129,000,000 rupiah or 636,779 USD). The area of the company plantation in Pasaman district is of 5,450 ha.⁵

The indigenous communities of *Nagari* Kapa and *Nagari* Sasak Ranah Pasisir

The concession of PT PHP I overlaps with the customary lands of the indigenous communities of *Nagari* Kapa and *Nagari* Sasak Ranah Pasisir, two neighboring *Nagari* communities in the district (*kabupaten*) of Pasaman Barat but in different sub-districts (*kecamatan*). The former lies in the sub-district of Luhak Nan Dua and the latter lies in the sub-district of Sasak Ranah Pesisir.⁶

Nagari Kapa encompasses an area of 87 km² and *Nagari* Sasak Ranah Pasisir covers

123.71 km². All the land has been used for settlements, oil palm estates and plasma estates set up by the oil palm company, and oil palm estates set up independently by the local communities. No land is left unused. About 10 years ago, the land in the vicinity of Rantau Panjang, a *orong* (hamlet) of *Nagari* Sasak, and the land across from Batang Pasaman were forested but have now been converted into oil plantations by both the company and the local communities. The customary land which is part of the PT PHP I concession was mostly uncultivated and consisted of swamps with sago trees. About 100 to 200 of the villagers used the swamps to catch fish (catfish) and collect rattan. Previously, the rattan had been transported to Padang via Sasak's wharf.

In 2010, *Nagari* Kapa had a population of 18,704 in 4,454 households, and *Nagari* Sasak Ranah Pesisir was home to 13,233 individuals in 3,028 households.⁷ The communities of Kapa and Sasak are customary law (*masyarakat adat*) communities. The original population of both *Nagari* was Minangkabau but the present day population of *Nagari* Kapa is made up of two ethnic groups; the Minangkabau and Javanese (about 300 households). The Javanese first came under the transmigration program in the 1950s and each household was given a piece of land by the customary leader via the district government of Pasaman. The community of *Nagari* Sasak Ranah Pesisir is mostly Minangkabau. In both *Nagari*, the Minangkabau refer to themselves as the *Nagari* Kapa and *Nagari* Sasak indigenous communities and identify themselves as members of Kapa people. The Javanese living in and around *Nagari* Kapa and *Nagari* Sasak are viewed by the government as migrants but are regarded as members of *Nagari* Kapa and Sasak societies by both the Minangkabau communities and themselves.

The language of the Minangkabau is of the Austronesian family with links to the Malay language. Until the 20th century,

the majority of the Minangkabau lived in the highlands, where they practised wet rice cultivation, as well as gathering forest products and trading in gold and ivory. An early Minangkabau figure, Adityawarman, was a follower of Buddhism with ties to the Singhasari and Majapahit kingdoms of Java. He founded a kingdom in the Minangkabau highlands at Pagaruyung in the mid-14th century. In the mid-16th century, the Aceh Sultanate took over the Minangkabau coast, regulating the gold trade and bringing Islam to the Minangkabau people. Contact and trade with Europeans also started in the 16th century. The Dutch East India Company acquired gold at Pariaman in 1651 and up to the early 19th century the Dutch remained content with their coastal trade of gold and produce and made no attempt to visit the Minangkabau highlands. At the beginning of the 19th century, the gold trade began to shrink while agricultural trade expanded, particularly coffee production in the highlands. In February 1958, dissatisfaction with the centralist and socialist policies of the Sukarno administration triggered a revolt which was centred in West Sumatra, with rebels supporting the Revolutionary Government of the Republic of Indonesia (PRRI) in Bukittinggi. By mid-1958, the Indonesian military had put down the rebellion in the major towns of West Sumatra. A period of guerrilla warfare ensued, but most rebels had surrendered by the end of 1961. In the 1960s, Javanese officials occupied most senior civilian, military and police positions in West Sumatra.

Since the distant past, *Nagari* Kapa and *Nagari* Sasak were customary territories, home to the Kapa and the Sasak communities. Each *Nagari* is a social unit made up of customary sub-units called *basa*, *kampung* or *koto*. These sub-units were formed as families grew and broke into smaller groups of kinship or due to migration in search of new agricultural land. After Indonesia's independence, the government determined *Nagari* Kapa and *Nagari* Sasak as both customary and administrative territories. Administratively, both *Nagari* are made

up of a number of *orong*. *Nagari* Kapa is made up of six *orong* (Kapa Utara, Lubuk Pudiang, Malasiro, Kapa Selatan, Kapa Timur and Padang Laweh), while *Nagari* Sasak is made up of seven *orong* (Maligi, Rantau Panjang, Pasalamo, Pondok, Padang Halaban, Pisang Hutan and Sialang).

The Kapa and the Sasak are based on matrilineal kinship groups. The largest kinship group is the tribe (*suku*) whose members belong to their mother's lineage. *Nagari* Sasak consists of seven tribes (*suku*): Jambak, Piliang, Melayu, Caniago, Koto, Sikumbang and Tanjung. Each tribe is led by the tribe chief. Each tribe also has leaders called *datuk*, all of whom are from the Jambak tribe. There are three *datuk* in *Nagari* Sasak: *datuk* Sanaro Mangkuto, *datuk* Basa, and *datuk* Rajo Alam. *Datuk* Sanaro is the head of the *datuk*. Slightly different from the Sasak, the Kapa are made up of tribe-based and *basa/kampung* (village) based kinship groups which are sub-tribe kinship groups. In *Nagari* Kapa, the kinship group with leaders is called *datuk basa/kampung* (village). There are eight *datuk* in *Nagari* Kapa, who are divided into four inner *datuk* and four outer *datuk*. The inner *datuk* are concerned with internal custom and relations within the community, the role of outer *datuk* concerns involvement with outside actors.

Traditionally, the communities in both *Nagari* have chosen and appointed their own leaders. At *Nagari* community level, there is the *pucuak adat*, who is the highest leader. This position is traditionally held by a *datuk*. In addition to the *pucuak adat*, at the *Nagari* level there exists the *Kerapatan Adat Nagari* (KAN), or Meeting of the *Adat Nagari*, which comprises leaders of kinship groups. Being a partner of the *pucuak adat*, KAN makes decisions on customary affairs. KAN is an institution formed later in both the *Nagari*'s history. At the kinship level, there are *datuk* who lead the kinship groups. In *Nagari* Sasak, there are also leaders of kinship groups called *kepala suku* (tribe chief). All these leaders are called *ninik mamak* by the Kapa and the Sasak.

Relations with the State

After Indonesia's independence, the government of Central Sumatra determined *Nagari* as the lowest level of government in West Sumatra. As for other *Nagari* in West Sumatra, the positions of *Wali Nagari* and *Wali orong* were introduced to *Nagari* Kapa and Sasak, and play an important role in the governance of both *Nagari*. Roles are shared between the *pucuak adat* and the *ninik mamak* on the one side and *Wali Nagari* and *Wali orong* on the other. The *pucuak adat* and the *ninik mamak* have authority in managing customary affairs while *Wali Nagari* and *Wali orong* hold administrative authority.

Following the enactment of Law No. 5, 1979 on Village Government, the *Nagari* governance of Kapa and Sasak was abolished and replaced with the village government system. A *orong* became a village and was governed by the village government, and *Wali Nagari* and *Wali orong* were abolished. Despite this, the provincial government of West Sumatra maintained *Nagari* as a customary unit and *Nagari* communities as customary law community units. Under Regional Government Regulation (Perda) No. 13 of 1983, the KAN was determined as the manager of *Nagari* communities and granted authority in customary affairs. Customary affairs concern *ulayat* (customary) land and tribes in *Nagari* Kapa and Sasak. To reconcile the role of the *pucuak adat* with that of the KAN, the district government of Pasaman appointed the *pucuak adat* as the head of the KAN. The handover of the land of *Nagari* Kapa and *Nagari* Sasak by the district government to PT PHP I took place in the period during which the village government system was applied in *Nagari* Kapa and *Nagari* Sasak.

Based on Regional Government Regulation (Perda) No. 9 of 2000 on the Fundamentals of *Nagari* Government, the provincial government of West Sumatra revived the *Nagari* government. In *Nagari* Kapa and *Nagari* Sasak, the

village government system was abolished and replaced with *Nagari* government. Villages were turned again into *orong* and *Nagari* once again became the lowest level of government. After 2000, *Nagari* Kapa and *Nagari* Sasak are led again by the *Nagari* government. *Wali Nagari* and *Wali orong* resumed power in the *Nagari* and *orong* governments. However, the KAN still holds authority in customary affairs (including that over *ulayat* land) along with the *pucuak adat*, who still holds the position of head of the KAN. With the return to the customary system, the dual

government system is still maintained: administrative affairs are governed by the *Nagari* government, and customary affairs, including that of *ulayat* land, are governed by the KAN and the *pucuak adat*.

Analysis of legal documents held by PT PHP I

Since it started its operations in 1992, PT PHP has obtained the following letters and permits:⁸

No.	Types of Letters	No.	Location	Institution/ Agency	Issuance Date
1	Articles of Incorporation of PT PHP	15	Medan	Dradjat Darmadji S. H, Public Notary	11 th May 1992
2	The proposed project for development of oil palm plantation of PT PHP				26 th May 1992
3	Letter of the Governor of West Sumatra concerning Principle Approval for 12,000 ha land allocation	525.26/1477/ Prod-92	<i>Nagari</i> Sasak	The Governor of West Sumatra Province	20 th June 1992
4	The decree of the <i>ninik mamak</i> of <i>Nagari</i> Sasak on agreement to transfer the right over 8,500 ha of Sasak's <i>ulayat</i> land to the State for a concession requested by PT PHP		<i>Nagari</i> Sasak	The <i>ninik mamak</i> of <i>Nagari</i> Sasak	26 th July 1992
5	Letter of the Regent of Pasaman concerning recommendation for 12,000 ha land allocation for PT PHP's oil palm plantation	No. 525.25/1575/ Perek-1992	<i>Nagari</i> Sasak and <i>Nagari</i> Sungai Aur	The Regent of Pasaman	26 th July 1992
6	Company's affidavit	KD.PHP.15/M/ VIII/92			5 th August 1992
7	Letter of Recommendation/ Support of the Head of the Provincial Estate Crops Office of West Sumatra	525.29/986/ 525.3		The Head of the Provincial Estate Crops Office of West Sumatra	24 th August 1992
8	Letter of the Minister of Agriculture concerning Principle Approval for a 9,000 ha oil palm plantation business in Pasaman sub-district, Pasaman district, West Sumatra Province	HK. 350/ E4.651/09.92		The Minister of Agriculture of the Republic of Indonesia	22 nd September 1992
9	Letter of Approval for investment/Principle Approval of the President of the Republic of Indonesia/the Head of BKPM concerning Notification of the President's Approval	117/I/PMA/1993, Nomor Proyek 1110/3115-08-5021		The President of the Republic of Indonesia/ the Head of BKPM	8 th July 1993
10	Decree of the Minister of Justice on Approval for Articles of Incorporation of PT PHP	No.02-266. HT.01.01.TH. 94		The Minister of Justice of the Republic of Indonesia	7 th January 1994

No.	Types of Letters	No.	Location	Institution/ Agency	Issuance Date
11	Letter of the Regent of Pasaman concerning Principle Approval for 4,000 ha Land Allocation for Oil Palm Plantation	525.25/356/ Perek 1995	Sikiliang	Letter of the Regent of Pasaman	31 st March 1995
12	Letter of Principle Approval of the Governor of West Sumatra	No.525.26/2013/ perek-95	West Sumatra	The Governor of West Sumatra	4 th April 1995
13	Application for Location Permit for 5,450 ha of land in Pasaman and Lembah Malintang sub-districts, Pasaman district, for Oil Palm Plantation	KD.PHP.17/P/ VIII/95	Pasaman	PT PHP	August 1995
14	Minutes of the Location Permit Coordination Meeting	No.17/BPN-1995	Pasaman	The National Lands Agency (BPN) of Pasaman	18 th October 1995
15	Decree of the Head of BPN of Pasaman district on Issuance of Location Permit for 3,850 ha of land to PT PHP	402.1144/BPN- 1995	Pasaman	The Head of the National Land Agency (BPN) of Pasaman district	20 th October 1995
16	Letter of approval of the <i>ninik mamak</i> responsible for <i>ulayat</i> land of north and south Kapa in <i>Nagari</i> Kapa concerning the handover of 1,600 ha of the <i>ulayat</i> land of north and south Kapa for PT PHP's oil palm plantation		Kapa	The <i>ninik mamak</i> of <i>Nagari</i> Kapa	6 th February 1997
17	Relinquishment Letter of the <i>ninik mamak</i> of Maligi village, Kenagarian Sasak, Pasaman Tunggal Subdistrict, approved by the Head of KAN Sasak and the district government officials of Pasaman, concerning the handover of 1,400 ha of land for nucleus and plasma estates		Sasak	The <i>ninik mamak</i> of Maligi Kenagarian, Sasak Village, Pasaman Subdistrict	14 th September 1997
18	PT PHP's Application for Location Permit	No.100.A/PHP- PR/Pem-X/1998		PT PHP	17 th January 1998
19	Minutes of the Location Permit Coordination Meeting	No.402.087.1/ BPN-1998		The National Land Agency(BPN) of Pasaman	20 th January 1998
20	Decree of the head of BPN of Pasaman on Issuance of Location Permit for 3,518 ha of land to PT PHP	402. 103/BPN- 1998	Sasak	The Head of The National Land Agency (BPN) of Pasaman district	24 th January 1998
21	Letter of the Regent of Pasaman concerning Approval for Land Allocation	593/3624/TAPEM		The Regent of Pasaman district	23 rd November 1998
22	Letter of the State Minister of Investment/The Head of BKPM concerning approval for change of the company's status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA)	49/V/PMA/1999 Nomor Proyek 1110/3115-08- 012630		The State Minister of Investment/the Head of BKPM	
23	PT PHP's Articles of Association Amendment Deed	NO.11	Deli Serdang	Eddy Simin, SH, Public Notary	3 rd December 1999

No.	Types of Letters	No.	Location	Institution/ Agency	Issuance Date
24	Letter of the Regent of Pasaman concerning Business Location Permit (SITU)	503/55/SITU/C. PAS/2001		The Regent of Pasaman	
25	Large-Scale Plantation Business Permit (SIUP)	No. 207/03.11/SIUP/XI/2002		The Industry and Trade Office of Pasaman district	28 th November 2002
26	Certificate of Company Registration (STDP)	No. 291/03.11/TDP/XI/2002		The Industry and Trade Office of Pasaman district	28 th November 2002
27	Letter of the Regent concerning Endorsement of Environmental Impact Assessment (AMDAL) Documents	008/06/PLH/2004		The Regent of Pasaman	18 th February 2004
28	Decree of the Head of BPN on issuance of Business Use Permit (HGU) on 1,600.725 ha of land in West Pasaman district for 30 years	No.65/HGU/BPN/2004	In the sub-districts of Luhak Nan Duo and Ranah Pesisir	The National Land Agency	4 th October 2004
29	Decree of the Head of BPN on issuance of HGU on 1,014.40 ha of land in West Pasaman district for 30 years	No.76/HGU/BPN/2004	In the sub-districts of Luhak Nan Duo and Ranah Pesisir	The National Land Agency	6 th October 2004

The following section analyses the legality of the land permits used by PT PHP I for oil palm plantation development in the PHP I area and the process conducted with communities to release their lands to the

government for plantation development by the company. The following information is derived from PT PHP I's legal documents and information gathered from interviews with the parties involved.

Legal documents for PHP I plantation area

Legal Obligation of Plantation Operations	Company's Documents	Remarks
a. Acquisition of land rights (1998)		
Letter of Recommendation and Principle Approval for land allocation	Letter of the Regent of Pasaman No. 525.25/356/Perek 1995 concerning Principle Approval for Land Allocation for 4,000 ha Oil Palm Plantation	The Location Permit was based on this letter, although it was effective only a year after its issuance and the Location Permit was not issued until 1998. Note: the company claims to have a Location Permit from 2005 but is yet to provide it to the researchers
Land survey	Document not available/found	
Minutes of the location permit coordination meeting	Minutes of the Coordination Meeting No.402.087.1/BPN-1998	The community members we interviewed stated that they had no involvement in meetings to coordinate issuance of the location permit. The company states it has minutes of such a meeting conducted by BPN
Location permit	Decree of the Head of BPN of Pasaman No.402. 103/BPN-1998 on Issuance of Location Permit for 3,518 hectares to PT PHP	The permit was based on an out-of-date recommendation letter from the Regent. The company states that this applies to PHP II

Legal Obligation of Plantation Operations	Company's Documents	Remarks
Community's agreement on the relinquishment of rights to land	Letter of approval of the <i>ninik mamak</i> responsible for <i>ulayat</i> land of north and south Kapa in <i>Nagari</i> Kapa concerning the handover of 1,600 ha of the <i>ulayat</i> land of north and south Kapa for PT PHP's oil palm plantation in 1997	This approval letter received much criticism from the community of <i>Nagari</i> Kapa as they believed that it was made without the approval of the whole community and that it was detrimental to them
Permit for forest area relinquishment from the Forestry Office	Document not available	There is no clear information whether the land in question was previously a forest area
Map of possessed lands	Location map of PHP I area was obtained from a cooperative	Verification: Electronic map data or clearer map images are needed
Business Use Permit (HGU)	Decree of the Head of BPN No.65/HGU/BPN/2004 on issuance of HGU on 1,600.725 hectares for 30 years	Normally this area is for the nucleus estate but in reality half of it is allocated for the plasma estate. The community still demands a larger plasma estate
b. Environmental Impact Assessment (AMDAL)	Letter of the Regent No.008/06/PLH/2004 concerning Endorsement of Environmental Management Documents	The AMDAL documents of PT PHP I were only prepared in 2003 and approved by the Regent in 2004 although the company had applied for a Business Permit and obtained a Location Permit and conducted land acquisitions for plantation in 1992. This means that for more than 11 years the company did not have AMDAL documents required for its operations. In addition, the community had not been involved in the preparation of the documents. According to the law, the affected community must be asked for their opinion on the AMDAL studies being undertaken
c. Plantation Business Permit (IUP)	Large-Scale Plantation Business Permit (SIUP) No. 207/03.11/SIUP/XI/2002 from the District Industry and Trade Office of Pasaman	The SIUP was issued by the District Industry and Trade Office, although according to the law, an IUP should be issued by the Estate Crops Office. There was no information available to the researchers as to whether an IUP has been issued
d. Company Registration	Certificate of Company Registration (TDP) No. 291/03.11/TDP/XI/2002 from the District Industry and Trade Office of Pasaman	The TDP for PT PHP was only issued in 2002. A TDP is valid for three years, so PT PHP did not have TDPs for at least three consecutive periods prior to 2002. The company claims to have certificates covering the whole period

The legality of a plantation operation in Indonesia is determined by whether or not the company meets all pre-determined legal requirements. As described in the chapter on the National Legal Framework for plantation operations in this volume, there are a number of conditions that must be met. If a plantation operation fails to meet even one requirement, it can be said to be operating without conforming to the law.

For the PHP I plantation area, the company is required to hold the following documents, and to have obtained them in the following order:

- Confirmation Letter concerning Land Allocation from the Governor
- Application for Investment to the Head of BKPM
- Investment Approval, which is also valid as Principle Approval or Temporary Business Permit
- Governor's Decree on Location Permit
- Decree of the Head of National Land Agency or the Head of the Regional Office of National Land Agency on HGU Licensing and HGU Certificate
- Decree of the Regent on Construction Permit (IMB) and Hindrance Act (UUG)/Hinder Ordinance (HO)

- Application to the Head of BKPM for approval on the list of capital goods, raw materials as well as auxiliary materials to be imported
- Decree of the Head of BKPM on Exemption on Import Duty and Other Import Taxes

Concerning the documents held by PT PHP, particularly those relating to PHP I, the researchers were able to obtain the Governor's Confirmation Letter No. 525.26/ 1477/Prod-92 dated 20th June 1992 concerning the land allocation of 12,000 ha in *Nagari* Sasak, Pasaman sub-district, Pasaman district. A careful search for and examination of the other documents failed to identify the BKPM's Letter concerning Approval for Investment, which also serves as Principle Approval or Temporary Business Permit, although the company claims to have the approval letter from BKPM. However, the researchers found the Principle Approval from the Ministry of Agriculture No. HK. 350/E4.651/09.92 dated 22nd September 1992 referring to the existence of:

- Articles of Incorporation of PT PHP
- Proposed Project for Development of Oil Palm Plantation of PT PHP
- Letter of the Governor of West Sumatra concerning Principle Approval for 12,000 ha land allocation
- Company's affidavit
- Letter of recommendation/support of the Head of the Provincial Estate Crops Office of West Sumatra

Under the regulations prevailing at the time, the company should first have had a Principle Approval from BKPM. However, based on the available documents, PT PHP did not possess this document. Therefore, it can be concluded that from a legal viewpoint PT PHP had no legal basis to make investments in Indonesia. Even if we assume that PT PHP I does have the BKPM's Principle Approval, it did not have the Location Permit, the HO Permit and the HGU permit that are required prior to the development of its plantations. From the available documents, the Location Permit

was only obtained in 1995, while the HO Permit and the HGU permit were only obtained in 2002 and 2003 respectively. As a Temporary Business Permit is only valid for one year (the company obtained it in 1992/1993), it is fair to say that PT PHP I does not meet the requirements stipulated by the prevailing regulations, and has therefore not been operating in conformity with the law.

Similarly, if one refers to the Temporary Business Permit issued in 1992 by the Ministry of Agriculture, which required PT PHP to prepare a feasibility study, apply for a HGU, prepare an AMDAL and make periodic reports within a year, it can be said that PT PHP did not meet its obligations as it only began to prepare its AMDAL in 2003 and did not have a HGU until 2003. This means that PT PHP began preparing its AMDAL 11 years after the issuance of Principle Approval by the Ministry of Agriculture and effectively operated for those 11 years without an HGU license.

In 1998, PT PHP applied again to BPN for a location permit. The required documents the company held at the time were:

- Letter of the Regent of Pasaman No. 525.25/356/Perek 1995 concerning Principle Approval for 4,000 ha Land Allocation for Oil Palm Plantations
- Letter of approval dated 1997 from the *ninik mamak* responsible for *ulayat* land of north and south Kapa in *Nagari* Kapa concerning the handover of 1,600 ha of the *ulayat* land of north and south Kapa for PT PHP's oil palm plantations
- Land Relinquishment letter dated 1997 from the *ninik mamak* of Maligi village *Nagari* Sasak, Pasaman Tunggal Subdistrict, acknowledged by the Head of KAN Sasak and the district government officials of Pasaman, concerning the release of 1,400 ha of community lands for nucleus and plasma estates.

Later in 1998, BPN issued a Location Permit for an area of 3,518 ha. The permit was

based on the letter of the Regent concerning land allocation approval in 1995, which was valid for only one year from its issuance date. Therefore, when used as the basis for the Location Permit, the period of validity of that letter had expired. Thus, the location permit issued in 1998 did not conform to the law, and, accordingly, all lands acquired under the permit also failed to fulfill legal requirements. The company claims to have the necessary letters to obtain the permit but is yet to provide them to the research team.

Based on this analysis, PT PHP I is yet to obtain the right to all the lands currently under its control. In summary, the company has not met the legal obligations required by the prevailing regulations, because:

- It did not have a valid Location Permit
- It did not have AMDAL documents as required at that time
- It did not have a HGU license prior to the development of its plantations

The AMDAL documents of PT PHP I were prepared in 2003 and endorsed by the Regent in 2004. This, however, raises legal issues, including the fact that:

- The AMDAL documents prepared in 2003 and endorsed by the Regent in 2004 were out of date in terms of the legal obligations of prevailing regulations. The documents should have been prepared in 1993 at the latest in accordance with the terms specified in the Letter of Principle Approval for oil palm plantations from the Ministry of Agriculture in 1992. The AMDAL was an assessment of the approved 9,000 ha plantation in Pasaman sub-district
- The AMDAL documents should have been issued in three phases, in accordance with the land allocation approval and the location permit issued by the relevant agencies. However, PT PHP only made one AMDAL document covering three land acquisition periods, namely in 1992, 1995 and 1998
- The AMDAL documents issued in 2004 include no record of public participation ie community member signatures approving the AMDAL documents.

- *Plasma area on peat soils adjacent to PHP I concession*



This is contrary to the provision on AMDAL preparation that stipulates that communities must be involved in the preparation of the AMDAL

- AMDAL is required for the issuance of a permanent Plantation Business Permit (IUP). However, PT PHP had received an IUP from the Industry Office two years before it obtained a Regent's letter endorsing its AMDAL. Thus the IUP is invalid because one of the mandatory requirements was not met
- The absence of an AMDAL from 1992 to 2004 means that the entire plantation business activities of PT PHP during that period lacked a legal basis, as an endorsed AMDAL is required for a plantation business to operate. In the case of PT PHP, its AMDAL documents were only prepared in 2003 and endorsed in 2004.

From 22nd September 1992, PT PHP held a temporary Plantation Business Permit issued by the Minister of Agriculture. This temporary permit was valid for one year, entailing a number of obligations that had to be met, namely:

- Preparing a feasibility study
- Processing the HGU
- Preparing an AMDAL study
- Making periodic reports on the business operation

With the issuance of the temporary IUP, the legal issues for PT PHP include:

- The fact that the company did not follow up the issuance of the temporary IUP by fulfilling the requirements specified in the IUP ie preparing AMDAL documents and processing an HGU within a year
- The permanent IUP was only issued in 2002 by the Industry Office, thus for 10 years PT PHP did not hold a permanent IUP as the legal basis for its operations.

Therefore, the operations of PT PHP I failed to conform to the law because the company did not have an IUP between

1992 and 2002. Moreover, the IUP issued in 2002 does not remove the legal duties PT PHP had failed to fulfill during the decade of 1992 to 2002. The legality of the 2002 IUP itself also remains questionable.

The customary land tenure of the Kapa and Sasak

The communities of Kapa and Sasak have their own regulations, authority and land-related conflict resolution mechanisms. In the government's conception, the regulations are called customary laws or Adat while the authority and the conflict resolution mechanisms are called customary institutions or *KAN (Kerapatan Adat Nagari)*. The section below will describe the customary laws and customary institutions of *Nagari* Kapa and *Nagari* Sasak with regard to agrarian resources.

To the Kapa and the Sasak, their territories belong to them. All pieces of land have their respective owners. There are four classifications of land ownership. The first one is customary land, which does not belong to any kinship group in particular but lies within the *Nagari* territory. It is collectively owned by all the communities. Customary land usually comprises forests or swamps not cultivated by the communities. The second type of land ownership is *bosa/kampuang* land. This also usually comprises forests or swamps and is under the authority of a *datuk*. The third type of land belongs to the kinship group of a mother's lineage. Such land was originally customary or *bosa/kampuang* land granted by the *Nagari*, tribe or *bosa* leader to a matrilineal kinship group in the past. In Minangkabau literature, such land is called *tanah pusaka tinggi* (literally 'high-level heritage land'). The fourth type of land is privately owned through purchase or clearing. In Minangkabau literature, such land is called *tanah pusaka rendah* (literally 'low-level heritage land').

To the Kapa and the Sasak, the authority over customary land lies in the hands of the *pucuak adat* and the *datuk*, with the former

being the highest authority and decision-making body with regards to customary land. In the districts of Pasaman Barat and Pasaman, such a system is called *babingkah* or *banungkah tanah*.⁹ Normatively, there is a power balance in authority over customary land as the *pucuak adat* must not make a decision without the knowledge and agreement of the *datuk* or the tribe chiefs. In *Nagari* Sasak the authority over *tanah pusaka tinggi* lies in the hands of the *datuk* or the tribe chiefs. In both *Nagari*, *kampung*/tribe-based kinship groups also have authority over land, but only over land which, in local terminology, is called ‘inherited land’ or *Pusako Tinggi* (ie land given by the *pucuak adat* to the groups).

It is important to discuss the regulations upheld by the Kapa and the Sasak concerning access to customary land and *bosa*/tribe land. Basically, members of a kinship group are entitled to manage customary land. The members may manage customary land or *bosa* land upon permission from the *pucuak adat* (for customary land) and the *datuk* (for *bosa* land) or the tribe chiefs (for land controlled by tribes in *Nagari* Sasak). A community member can directly cultivate customary land or *bosa* land but must seek permission from the *pucuak adat* or the *datuk* or the tribe chiefs to obtain certainty of the right to cultivate that area. To be cultivated, such land must never have been cultivated by others. To seek permission from the relevant *ninik mamak* (the *pucuak adat* in case of customary land; the *datuk* in case of *bosa* land) a community member must pay a customary compensation called *adat disisi limbago dituang* to the *ninik mamak*. The compensation is based on the custom called *ka rimbo babungo kayu, ka lauik ba bungo karang* (literally, ‘to the forests one can find tree flowers; to the sea one can find coral flowers [sponge]’).

Land managed by members of a kinship group becomes the property of the cultivators and such land has the customary status of *pusako rendah* (low-level heritage). Customary/*bosa*/tribe land cultivated with the permission of the relevant *ninik mamak*

can become the property of the cultivators as they may sell the land with the permission of the relevant *ninik mamak*. Recently, a growing number of rights-holders over what was once customary/*bosa*/tribe land have sold the land to either members of other kinship groups or to outsiders. While such an act is not considered a violation of customary rules, the communities think that it has made the Kapa and the Sasak mere observers in the development of oil palm.

Different rules of land tenure and acquisition are imposed on outsiders. Outsiders may access customary/*bosa*/tribe land but cannot obtain proprietary rights to it, unlike members of a kinship group. The only right that can be granted to outsiders is the right to utilise land. The customary norm of the Kapa and the Sasak concerning the granting of rights to outsiders is *ibarat kubangan kabau, kabau pai kubangan tingga* (literally, ‘like a buffalo’s wallow; when the buffalo leaves, the wallow remains’). To obtain customary utilisation rights, outsiders have to pay compensation called *adat disisi limbago dituang* and *bunga kayu* to the relevant *ninik mamak*. In addition, if the land to be cultivated has formerly been managed by members of a kinship group, the outsider has to pay *siliah jariah* (‘compensation for the work done’) and has to pay for any plants of economic value growing on the land.

Unlike the Javanese, the Kapa and the Sasak have a collective and matrilineal heritage system. Customary land is owned collectively and is passed down from one generation to another as a collective property, by both men and women. The same applies to *bosa* land. Both classifications of land can be controlled by any member of a kinship group, both men and women. The inheritance system for land (both *pusaka tinggi* and *pusaka rendah*) is based on the mother’s lineage, which means that it is female children, rather than males, who are entitled to the inherited land. Although the Kapa and the Sasak are Muslim, they have not adopted Islamic inheritance laws, but continue to follow Minangkabau customs in this respect.

Process of land acquisition

The land used by PT PHP I is the customary land of both *Nagari* Kapa and *Nagari* Sasak. In 1997, in *Nagari* Kapa, the *ninik mamak* (the *pucuak adat* and the four inner *ninik mamak* and the four outer *ninik mamak*), with the full knowledge of the heads of all the villages in *Nagari* Kapa, handed over customary lands to the Regent of Pasaman, who further granted these areas to the oil palm investor, PT PHP. The handover was recorded in a land handover letter signed by the *ninik mamak* with full knowledge of the village heads.

The handover of the customary land to the Regent of Pasaman (and then to PT PHP) first took place in *Nagari* Sasak and then in *Nagari* Kapa. As detailed information was only gathered on the acquisition of *Nagari* Kapa's customary land, this section and the following ones will only describe the situation for this *Nagari*. In 1994, three years after oil palm was developed in *Nagari* Sasak, PT PHP contacted the *pucuak adat* of *Nagari* Kapa to discuss its interest in setting up oil palm estates and asked for lands in *Nagari* Kapa. The then Regent of Pasaman district (Taufik Marta) invited the *pucuak adat*, the head of KAN, and the *datuk* to meet him in Lubuk Sikaping. The invitees were intended to be the representatives of the *Nagari* Kapa community. Acting as the head of the representatives were the *pucuak adat*. The representation was not a result of a deliberation process but was based on the applicable customary authority structure. In the meeting, the Regent asked that the swamp lands in the *Nagari* be granted to PT PHP for oil palm development. He said that the oil palm estates would be divided into two kinds: nucleus (70%) and plasma (30%). The representatives of *Nagari* Kapa gave their consent to hand over the swamp area without first consulting with the Kapa community as rights holders of the customary land.

During the meeting, Mr. Bahar – the head of KAN – raised an objection to the ratio of the estates (70:30). He suggested a ratio of

50:50, to which the Regent objected. Despite the consent to hand over the customary land, the meeting did not reach an agreement on the ratio of the nucleus-plasma estates, and the handover was suspended.

Three years later, in 1997, the district government of Pasaman via the head of Pasaman sub-district contacted the *pucuak adat* of *Nagari* Kapa again to have a discussion on the relinquishment of the customary land. The meeting was held probably because PT PHP kept asking the Pasaman Regent for lands. The sub-district head invited the *pucuak adat* and the *ninik mamak* to a meeting. In the meeting the 50:50 ratio of the nucleus-plasma estates proposed in the previous meeting three years ago was approved. The agreement was then written in a land handover letter.¹⁰ As such, the *ninik mamak* of *Nagari* Kapa officially handed over the customary land to the Regent to be further granted to PT PHP. No consultations were held with the wider Kapa community prior to this decision. The land handover letter from the customary leader of *Nagari* Sasak to Pasaman Regent to be further granted to PT PHP contains the same ratio: 50% for nucleus estates and 50% for plasma estates.

An *ninik mamak* meeting was then held, which was attended by the *Nagari* representatives and the village heads, where the *pucuak adat* shared the results of the meeting with the Regent. The *ninik mamak* meeting seemed to have been held to disseminate information rather than to make a decision. In the meeting, some members of *Nagari* Kapa disagreed to the handover and protested against the agreement. However, the *pucuak adat* and the head of KAN took no notice of the protest, most probably because the agreement to relinquish customary lands had already been made. In a meeting in early 2012 attended by at least 10 community leaders of *orong Rantau Panjang* (a hamlet of *Nagari* Sasak) and the Tribe Chief, who held office when the agreement was made, the participants said that the community of *Rantau Panjang* was not consulted in the decision-making

process. In the words of the Tribe Chief, 'I did not know anything about the handover until the company started to cultivate the land.'

The district government of Pasaman and the company did not disseminate information on the decision about the handover. It appears that his information was only circulated among the *ninik mamak* who participated in the meetings with the government. All information was kept by the customary leaders and was unknown to the *Nagari* communities, who held the rights to the land.

Yet both the district government of Pasaman and PT PHP I acknowledge that the land converted into oil palm estates customarily belonged to the communities of *Nagari* Kapa and *Nagari* Sasak, as indicated by the fact that the company and the district government needed to seek permission from the *ninik mamak* to use the land. Such acknowledgement was also clear from the inclusion of the term 'customary land' in the handover letter. PT PHP I itself had paid the compensation as regulated by the customary law for the land handed over by the *ninik mamak*. As described above, the *ulayat* land of *Nagari* Kapa is owned collectively by the community. In the view of the Kapa community, there is no single piece of land in its territory without an owner – a claim based on the local values and customs that is constitutionally supported by Article 18B paragraph (2) of the 1945 Constitution of Indonesia.

However, in the development of PT PHP I's oil palm estates, the land was acquired without involving the entire *Nagari* Kapa community. Only customary leaders were invited and talked to by the district government and the company. A former member of the *ninik mamak* of *Nagari* Kapa, Pak Bahar, who had been involved in the meetings discussing PT PHP I's plan to set up oil palm estates, testifies that he, along with other customary leaders and the *ninik mamak* released over 1,600 ha of land on 6 February 1997 to the Regent of Pasaman

district (currently Pasaman Barat district), claiming they acted on behalf of all the owners of the *ulayat* land of Ke *Nagarian* Kapa.¹¹ The purpose of the land release was so that PT PHP I could develop oil palm plantations in *Nagari* Kapa.¹² Pak Bahar said that during the process of releasing the land, the customary leaders had held a village meeting with the wider community and that the community had agreed to accept and support the company's plan.¹³

However, field findings and documents obtained revealed that the decision of the customary leaders to the handover of the 1,600 ha of land was not made with full participation of the *Nagari* community, including the absence of women (*bundo kanduang*).¹⁴ This is substantiated by the presence of a clause in the letter signed by the customary leaders and the *ninik mamak* on 6 February 1997 stating that the undersigned would be held accountable should there be problems relating to the land in the future, including claims by other parties to the land. This raises questions about the extent to which the agreement to release customary lands was made only by the leaders or with the involvement of the entire community (*cucu kemenakan*).

During the land handover of 1997, the district government of Pasaman (now Pasaman Barat) and PT PHP simply trusted the statement of the customary leaders and the *ninik mamak*, and appear to have turned a blind eye to the possibility that many among the *Nagari* community (*anak kemenakan*) might disagree to the handover. As a result, conflicts over the lands continue to this day. Community members not involved in the agreement-reaching process have continued to stage protests over the last 15 years, demanding that their land be returned to them. Some protests have been made by Tunas Mekar, a farmer's group of *Nagari* Kapa members. The protests concern both the loss of land, which *Nagari* Kapa custom regards as reserved for children and grandchildren, and also the way in which the district government and the company obtained the land.

Considering the requirement on RSPO member companies to address ongoing conflicts over land, the community protests over the land acquired by PT PHP I clearly place a strong obligation on PT HPH to respond in good faith to the community concerns. The handover of the land by customary leaders to the district government for the use of PT PHI can be seen to represent only their own interests, while the interests of their *Nagari* community (*anak kemenakan*), who are rights holders over land and an integral part of the *Nagari*, were ignored. It is therefore understandable that the customary leaders are being accused by their members of receiving benefits (i.e. money) from the land acquisition process.¹⁵ This is also substantiated by the documents prepared by Tunas Mekar relating to demands for settlement of land conflicts in *Nagari* Kapa in 2006.¹⁶

The right of community members to give or withhold their consent was also not respected by the district government in the process of granting permits to PT PHP I, including Location Permits and HGU as well as in the development of AMDAL documents. The interviews with more than 10 community members from different settlements within *Nagari* Kapa reveal that in each of these processes, their opinions were not sought, and they were not party to decisions to release lands, even though customary laws require the whole community's involvement in processes concerning land allocation, as described in the previous sections.

Problems arising after the handover

Land conflict

After the *ninik mamak* gave up some of the community's *ulayat* land in 1999-2000, the *cucu kemenakan* (descendants) in Kapa attempted to work the remaining part of the *ulayat* land, which lies between PT PHP I's concession and Sidodadi village. About 150 households wished to work the remaining

part, which encompassed approximately 200 ha. However, the effort was prevented by BRIMOB (Mobile Police Brigade). It is not clear who reported the community's act to the Police. The expulsion of the local cultivators drove the community to vandalise the Police Office. The Police arrested several men suspected of leading or committing the vandalism. Several community members were arrested, tried and imprisoned.

The community reported the case to various government agencies in West Sumatra and Jakarta and took the case to court. The civil suit is currently being handled by the Supreme Court of the Republic of Indonesia. Despite the civil suit, the land in question is now controlled by wealthy individuals whose origin is unknown. It is reported that a police officer has control over a 40 ha piece of land although he is not one of the *anak kemenakan* of Kapa. The dispute between the *ninik mamak*, *cucu* and *budo kandung* who rejected the handover of the land and the *ninik mamak* who handed over the land was on-going at the time of the field study.

Plasma estates

The handover of plasma estates from the company to the communities in both *Nagari* was not carried out properly, and only took place due to community pressure. In 2000, the communities of Kapa and Sasak staged a protest, as the promised plasma estates had not been handed over by the company although the company was said to have planted all the estates and these had started to be productive. No information on when the handover of plasma estates would take place has been made available. The communities prevented the company from harvesting oil palms until their demand was met. In 2004, PT PHP I handed over 353 ha of plasma estates to *Nagari* Kapa. The communities of both *Nagari* however raised an objection to this as the plasma estates that were provided were smaller than what had been agreed (50% of the total estates).

The communities kept demanding that the company fulfill its promise. Five years later, the company handed over another 344 ha of plasma estates to *Nagari* Kapa.

According to PT PHP I and the head of KUD (village-level cooperative), all the plasma estates had been given back to the communities, but the communities of both *Nagari* were still unsatisfied with the size of the plasma estates. Some of the customary leaders in *Nagari* Kapa thought that the company had not fully fulfilled its promise. The plasma estates were smaller than promised because the company was thought to have set up larger estates than it had said it would. The community leaders demanded re-measurement of all the estates – both the nucleus and the plasma given to *Nagari* Kapa. In response, the company asserted that the re-measurement was not necessary as a participatory measurement process had been carried out in 2004. Despite the company's explanation, there is still dissatisfaction with the data on the size of the estates among the customary leaders in both *Nagari*. In addition, the community of *lorong* Rantau Panjang thought that the size of the plasma estates they received from the company (they could not tell the exact size, but the estates were said to be 40 to 46 hectares in size) was far below what they had expected. According to them, PT PHP I had not fully fulfilled its promise. Despite their dissatisfaction, they did not express their aspirations to the company. A discussion between the authors and the company revealed that the company had never received any formal complaint from the community of *lorong* Rantau Panjang.

There were other problems with the plasma estates. First, they were not handed over to individuals but to groups, who then became the owners of the estates. The head of the District Estate Crops Office of Pasaman Barat confirmed that such group-owned estates could not be said to be the plasma estates as regulated in government regulations. Second, the handover of the estates to groups caused problems among the group members, who were dissatisfied

with the group leader's transparency regarding the price of FFBs paid by the KUD. PT PHP I asserted that the problems arising within the groups (called plasma groups) were not their responsibility. The company said that it was the responsibility of the *ninik mamak* of *Nagari* Kapa and *Nagari* Sasak to settle plasma-related problems. Community members believe that because the company had promised to set up plasma estates for the communities of Kapa and Sasak, it should also assume responsibility for plasma-related problems.

After the handover, a new problem arose. Not all of the community members gained benefits from the plasma while there were others who were not members of the Kapa community who obtained plasma, thereby benefiting from the *ulayat* land meant for the welfare of the children and grandchildren. In an interview with the Plasma Cooperative of Kapa, the chairman of the cooperative said that non-Kapa people gained benefits from the plasma because the Kapa communities sold the produce to them. There were also some community members who gained no benefits at all from the plasma although they had been living in Kapa for a long time. To date the communities do not know with certainty the exact size of the *ulayat* land managed by PT PHP I. Bahar, a member of the *ninik mamak* who handed over the land to the company, says that he once asked PT PHP I to re-measure the land to find out the exact size. However, the company is yet to conduct the re-measurement.

PT PHP I's unilateral determination of who would represent the communities

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As described above, the communities of Kapa and Sasak have their own customary institutions and governance, namely KAN, the *pucuak adat* and the *Nagari* government. Despite these institutions, community members we interviewed claimed that PT PHP I unilaterally appointed the KUD management to represent the communities, by referring to government regulations only. The KUD and its management is not



■ Pak Bahar being interviewed by the research team

the institution chosen by the communities to deal with outsiders according to customary practices. PT PHP I argues that the *ninik mamak* was part of KUD and hence they determined that the KUD was representative of the communities in accordance with local tradition. This is regarded by community members as incorrect as the *ninik mamak* in KUD served as members only, not as representatives or leaders of the community. If the KUD management had been appointed as the representative of the communities, the appointment should have been agreed to by the communities.

Another indication of unfair practices in land acquisition was the effort made to get rid of traditional leaders who refused to hand over customary lands to the government. Not all the members of the *indwak* and the *ninik mamak* agreed to hand over the land to the government – some refused. According to these individuals, the handover was in direct contradiction to Kapa customs, as the land was meant for the *cucu kemenakan*, for their future. Those refusing to hand over lands also

refused to receive the *siliah jariah* money. As a result, they were ostracised. One way to get rid of the members of the *ninik mamak* was by suddenly replacing them with new members. At that time, *dato* Mansurdin, who was elected by his people, was suddenly replaced without any consent from his community and without appointment by the community *ninik mamak*. His replacement was one of his relatives who by custom ‘just stays’ with *dato* Mansurdin’s people. This relative then claimed the title of *dato* Rangkayo Mudo. It was he who later, with the other *dato*, agreed to hand over the land to the government.

Distortion of the meaning of ‘*siliah jariah*’ compensation

According to Kapa custom, *siliah jariah* is a form of bunga pohon dari hutan (literally ‘flowers from the trees of the forest’), a form of tax paid for using customary land. Colchester et al (2006) note that *siliah jariah* is compensation paid for the energy and ideas devoted by a land owner in managing a piece of land. *Siliah jariah* does not transfer the right to own land, but the right to manage

land. If one wants to have full management rights over a plot of land, one must first be adopted by the relevant indigenous community and respect and follow their customs.¹⁷

PT PHP I, however, interpreted *siliah jariah* as money given to communities when they relinquish their customary rights, or the right to their *ulayat* land. Companies frequently use this term to smooth the way for land sales and purchases from customary communities. This can be inferred from statements by the management of PT PHP I about *siliah jariah* when they were interviewed by the researchers on 28th June 2012. One staff member states:

When the company first came to the area, there was a customary compensation called *siliah jariah*. *Siliah jariah* means the relinquishment of a customary right, which means that the right to *ulayat* land is relinquished.

It is probable that Kapa community members received money from PT PHP I through their *ninik mamak* because the company said it was *siliah jariah*, a tax paid by the company for using their land. Bu Mas states that after receiving the compensation money, many of the communities agreed to hand over their land to the company. Bu Mas adds:

After the communities received *uang bunga kayu*, called *siliah jariah* here, many of them agreed to hand over the land. But it seems that they did not know at that time what the money meant; they did not seem to know why somebody gave them the money.

What has the government done to help or require companies to respect international instruments and voluntary standards?

Judging from the opinions and views of the district government officials interviewed, no room has been available for the consideration or adoption of international instruments in relation to the right to FPIC, human rights and/or voluntary standards. In

the interview, government representatives stated that the only applicable standard was existing national laws. They claimed to respect customary land laws (such as those on *ulayat* land) but said that the only applicable laws were the formal ones, namely, State law. Nearly all customary laws observed by indigenous people are unwritten ones.

Assistant I and the Head of the Agrarian Agency of the District Government of Pasaman Barat stated that the district government does not have regulations, policies or Standard Operational Procedures concerning agrarian affairs and the settlement of agrarian conflicts. The district is new, the result of a split from the district of Pasaman in 2003. The number of land conflicts in Pasaman Barat is high and this is why the Agrarian Agency, which was previously under Governance Affairs, is now an independent agency, namely the Agrarian Affairs Department.

The district government officials were aware that the release of *ulayat* land by the *ninik mamak* was not carried out with the consent of all the *ninik mamak*, *cucu kemenakan*, and *budo kandung*. According to the officials, however, the handover was legitimate as there was a written statement of the handover. They state that the land was released by the *ninik mamak* to the government, and the government granted it to investors. The officials believe that the *ninik mamak* and the Kapa community no longer have the right to the customary lands that were released.

The government officials admitted that the Kapa are an indigenous people as indicated by the observance of local customs and values, customary structures and customary land ownership. According to the customs prevailing in Kapa, prior to the release of lands a customary meeting must be held so that the views of all the groups in the community can be heard. However, the land had simply been given up by some, not all, of the *ninik mamak* despite the fact that the Kapa observe *babingka adat*, according to

Perspectives of an *indwak*, a women's leader in Kapa



■ Bu Mas with researcher, Fatilda Hasibuan

Bu Mas, one of the *indwak* or women's leaders of Nagari Kapa, believes that the land now managed by PT PHP still belongs to the Kapa people. According to her, the land was leased to the company for a 25-year period by the *ninik mamak* of Kapa. After 25 years, it will return to the Kapa people because it is their customary land. As one of the women's leaders in her community, she is certain that the land has not been sold because customary land cannot be sold.

How can the customary land be sold? It is for our *cucu kemenakan*; it cannot be sold. If the land is handed over to someone else, how can our *cucu kemenakan* make a living?

Her conviction differs from statements by the district government of West Pasaman via the First Assistant, who states that the customary land of Kapa has been handed over to the district government by the *ninik mamak* of Kapa. The agreement was made in ink. The district government then provided these lands to investors. The company has turned the land into plasma and nucleus (*inti*) oil palm estates. For the part used as plasma, based on the Regent's Decree, the ownership certificate will be granted; on the other part, a business

use permit (HGU) has been issued. The part encumbered by HGU is now classified as State land. When the permit expires, the land shall be returned to the State. In the words of the First Assistant:

The land that the *ninik mamak* handed over is now encumbered by HGU. It is no longer *ulayat* land.

According to the staff of PT PHP II, the company is likely to extend its HGU, and when the HGU expires, it will abide by the prevailing rules, that is to say, returning the land to the State as they agree that it belongs to the State.

In the letter handing over land from the *ninik mamak* of Kapa to the district government of Pasaman, there are no clauses concerning the return of the land to the community. According to Bahar, one of the *ninik mamak* who handed over the land to the government, if the 25-year period of rent is over, the land will be returned to his community although this is not regulated in the land release letter. However, he notes that in a meeting with the district government of West Pasaman held in mid-2011, the Law Bureau of the West Pasaman District Government stated that the returning of the land to the customary community was not the government's final decision.

As an *indwak* in Kapa, Bu Mas said that she did not intend to extend the contract with the company. For her, it is time that the land is returned to the Kapa people because the number of grandchildren keeps growing and they all need to make a living.

If the contract is over, I don't want it to be extended. The land must be returned to the owners - my Kapa community and our grandchildren. If the government or the company refuses to return the land to us, we shall fight for it.

which *ulayat* land belongs to all the groups or *cucu kemenakan*; the *ninik mamak* only serve as the protectors of the land, or Manjago Sako Jopusako. *Ulayat* land is customarily reserved for *cucu kemenakan*, and it cannot be sold or transferred. When a person asks for a piece of land, custom says that the person should become part of the *anak kemenakan* in Kapa, for which a customary ceremony must be held (*menguningkan nasi*, literally ‘making yellow rice’ and saying a prayer). *Menguningkan nasi* is one of the most sacred ceremonies in Kapa as it is held to call the ancestors’ spirits. However, the ceremony had not been held during the release of land for the use PT PHP I. However, from the officials’ point of view, it is clear that customary laws will not be taken into consideration if the government wishes to settle the conflict between the Kapa community and the company.

All the officials interviewed are aware of the conflict between *Nagari* Kapa-Sasak and PT PHP I. According to Assistant I, Pasaman Barat is seeking a means to settle conflicts, both land-related and plasma-related, between the company and the communities. He stated that the RSPO standard will be used to help develop the district government’s concept. In 2012, the Regent of Pasaman Barat recently ordered that all company licenses granted in Pasaman Barat be reviewed.

Around 2004, the district government formed an agrarian-related conflict settlement team, whose members are made up of various elements such as the District Government, the Estate Crops Office, the District Police, and community leaders. Assistant I, the head of the Estate Crops Office, and the National Land Agency are members of the Conflict Resolution Team of Pasaman Barat. However, they stated that they are only the facilitators and mediators, bringing the conflicting parties to meet, to find out what the problem is, and to ask each party what their demands are. If the parties can reach an agreement, the problem is resolved. If they do not, the case may be brought to court, as these officials cannot make a decision on these disputes.

Similarly, no response has been given by the government to the request for re-measurement of both the nucleus and plasma estates as proposed by Bahar and other members of the *ninik mamak*. The total land released encompassed 1,600 ha while the plasma given by the company totals 670 ha. To obtain the remaining plasma estates, Bahar has verbally requested the National Land Agency to re-measure the land. Bahar estimates that the nucleus estates cover over 800 ha. According to the head of the District Estate Crops of Pasaman Barat, the re-measurement proposal is a good one, as it could clear things up, but he was concerned that the land area may turn out to be smaller than it should be. The land was in fact not measured when it was handed over. If the nucleus estates are larger, the excess can be given to the community, but what about if they are smaller? No response has been given by the government to the request by the community to date.

When asked what would become of the *ulayat* lands when the HGU expired, the head of the Estate Crops states:

The land release letter states that the land will be returned to the State, not to the community, because the land has been handed over by the *ninik mamak* to the government, and then the government granted it to the company. It’s all done.

The head of the District Agrarian Agency adds:

To date, no national regulations stipulate that after an HGU expires the land previously encumbered by the permit will be returned to indigenous communities. The *ninik mamak* has given up their right over the land to the State so they no longer have the right. They have signed the relinquishment letter.

The officials’ views do not offer room for the application of customary laws despite the fact that in West Sumatra most inhabitants still observe customary values and laws and still recognise customary ownership and customary institutions. In addition to protection by the 1945 Constitution, several

National and Provincial laws do recognise customary laws. For example Law No. 39 of 1999 on Human Rights, Article 67:

Anyone living in the state territory of the Republic of Indonesia is obliged to obey the legislation, unwritten laws and international laws on human rights, which have been accepted by the Republic of Indonesia.

One of the basic human rights relating to indigenous peoples and their rights is regulated in Article 6 paragraph (1):

In order to uphold human rights, differences within and the needs of customary law communities must be taken care of and protected by the law, communities and the government.

Paragraph (2) further stipulates:

The cultural identity of customary law communities, including the right to *ulayat* land, is protected, in line with the advancement of civilisation.

Law No. 32 of 2004 on Regional Government also provides room for provincial governments to regulate and take care of the interests of local communities based on their own initiatives and aspirations, within the general framework of laws in the Republic of Indonesia. In line with that law, the provincial government of West Sumatra issued two provincial laws, namely the Provincial Regulation of West Sumatra No. 2 of 2007 on Fundamentals of *Nagari* Governance and the Provincial Regulation of West Sumatra No. 16 of 2008 on *Ulayat* Land and Its Utilisation. When asked their opinion on Article 3 paragraph (3) of Provincial Regulation No. 16 of 2008, which stipulates that:

In the event that *ulayat* land is no longer utilised by the manager, be it a legal entity and or individual, the land shall be returned to the customary owner while considering the civil rights of the person concerned that are related to the *ulayat* land

the officials stated that the regulation may not be applicable as one needs to look at the

higher laws or the laws regulating business use permit (HGU) instead/first. Yet Article 4 of the Regulation clearly stipulates that:

The purpose of the regulations on *ulayat* land and its utilisation is to protect *ulayat* land in accordance with the Minangkabau customary laws and to enjoy the benefits from land, including natural resources, for the survival of customary law communities and the continuity of their lives from one generation to another and uninterruptedly across customary law communities and their territories.

However, judging from the officials' responses to the researchers' questions, it is most unlikely that the District Government of Pasaman Barat will adopt regulations concerning respect for *ulayat* land or require plantation companies to respect the right of communities to FPIC, or to follow voluntary standards requiring the resolution of the conflict between PT PHP I and the Kapa community.

Recommendations

Recommendations to the company

- To demonstrate to the affected communities, the government and the wider society that the company has the legal right to establish and manage plantations on the lands of *Nagari* Kapa by providing all documents related to the significant legal shortcomings identified in this study.
- To establish a mechanism to receive and resolve conflicts with the *Nagari* Kapa community, and not rely on the community smallholder cooperative alone to play this role.
- To engage with all sections of the Kapa community and respect the wishes of the community as to who from the community liaises with the company, and what consultation and decision-making processes within the community need to take place for a decision concerning land use to be valid.
- To inform the community, the government and the wider society

about its obligations as an RSPO member to respect the rights of the Kapa community, including the right of the community to give or withhold its consent to the release of lands for the use of the company.

- To inform the community, the government and wider society of how it intends to respect the customary rights of the Kapa community and to set out a timeline and action plan for establishing a mutually agreed mechanism for resolving existing conflicts.
- To actively support the community to regain its rights over the *ulayat* lands that were released to the government and then to the company, as the community considers that their lands were only leased to the company, and not sold.
- To offer to assist the affected community with participatory mapping of customary lands and concession/HGU boundaries in order to clarify who is entitled to compensation for leased land, and if any additional plasma areas need to be transferred to the community.
- To provide information pertaining to the company's operations to all community members in an adequate, sufficient and timely manner.

Recommendations to the District Government

- To undertake a review of the legal basis of the operations of PT PHP I in Pasaman Barat, in particular examining the legal shortcomings identified in this study.
- To develop a District law, based on the Provincial law on *Nagari*, with the aim of securing the rights of customary communities to their *ulayat* land and recognising their institutions and customary systems of government.
- To create a mechanism for communities to lease their lands to oil palm companies or other developers in a way that ensures that their rights under both national and international laws, as well as any applicable voluntary standards, are recognised and respected.

- To grant public access to the legal documents relating to the licensing and control of land by PT PHP I to ensure public disclosure.
- To conduct monitoring of legal violations identified in this study, enforce any regulations or laws that have been broken and withdraw any permits found to be invalid.

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Attachment of the Decree of the State Minister of Investment/the Head of BKPM No. 49/V/PMA/1999 dated 19th April 1999 on Approval for Change of the Company's Status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA).

Endnotes

1. The company was originally named PHP and then expanded to create PHP II with the original area and company being renamed PHP I.
2. SK HGU (Inti) PHP 1 No.65/HGU/BPN/2004.
3. This information is taken from the Letter of the State Minister of Investment/the Head of BKPM No49/V/PMA/1999 dated 19th April 1999 on Approval for Change of the Company's Status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA).
4. *Nagari* is a Minangkabau word meaning village.
5. The information is taken from the Attachment of

- the Decree of the State Minister of Investment/ the Head of BKPM No. 49/V/PMA/1999 dated 19 April 1999 on Approval for Change of the Company's Status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA).
6. There is another *Nagari* in Luhak Nan Dua, *Nagari* Koto Baru, while Sasak Ranah Pesisir consists of one *Nagari* only. Luhak Nan Dua seceded from Pasaman sub-district and Pasaman Barat seceded from Pasaman district in 2002. The lands of both *Nagari* Kapa and *Nagari* Sasak were acquired by the government and were then granted to PT PHP I when both *Nagari* were still part of Pasaman district.
 7. Badan Pusat Statistik 2010.
 8. The information is taken from the attachments of PT PHP's UKP/UPL document, endorsed by the Regent of Pasaman in 2004.
 9. In the districts of Pasaman Barat and Pasaman, there are two kinds of authority over customary or *ulayat* land. The first one is *babingkah* or *babungkah adat (kepingan adat)*, where the leader of a kinship group has the highest decision making authority over communal land affairs. The second is *babingkah* or *babungkah tanah (kepingan tanah)*, where the *pucuk adat* is the highest decision-making body in communal land affairs. The models differ concerning what is called communal land. In *Nagari* that adopt the *babingkah tanah* model, there is customary land that is owned collectively. In *Nagari* adopting the *babingkah adat* model, there is no customary land but tribe and clan land, such as in *Nagari* Kinali.
 10. The researchers have seen the letter and can confirm it states that 50% of the land would be for nucleus estates and the other half for plasma estates, which would be handed over to the Kapa community.
 11. As per document signed by the *Ninik mamak*/ customary leaders stating the handover of 1,600 ha of land to the District Government of Pasaman for oil palm development by PT PHP.
 12. As per agreement document signed on 6th February 1997 by the *ninik mamak*/customary leaders, holders of the *ulayat* land of North and South Kapa in *Nagari* Kapa, Pasaman Subdistrict, Pasaman district.
 13. Ibid.
 14. Bundo Kanduang is the personification of the Minangkabau tribe as well as a term used to refer to a woman leading a family in Minangkabau culture.
 15. Interview with a member of *Tunas Mekar*' (farmer's group), Mr. Z, 26th June 2012.
 16. A document entitled the National Agenda Plan for the Settlement of the Conflicts over the Kapa's *ulayat* Land in Pasaman Barat district mentions how the customary leaders of *Nagari* Kapa misused their authority to sell, transfer or hand over right to land to outsiders without the community's knowledge.
 17. Colchester et al 2006:132.

PT REA Kaltim Plantations and the Dayak and Kutai peoples of Kutai Kartanegara and Tabang, East Kalimantan

5

Sophie Chao, Emil Kleden, Agustinus Karlo Lumban Raja, Isal Wardhana and Intan Cinditiara

Area in question

The province of East Kalimantan is the second largest Indonesian province and is located on the east of Borneo island. It is composed of four administrative cities, nine districts (*kapupaten*), 1,347 villages (*kampung*) and 122 sub-districts (*kecamatan*). In 2005, the population of East Kalimantan was 2.8 million with a population density of 11.22 per square kilometre, relatively evenly distributed between coastal areas and the interior. Six ecosystems are to be found in the region: karst landscapes, peat marsh, mangrove, natural re-growth forest (*hutan kerangas*), flatland dipterocarp forest and humid forest. 162 rivers run through the province, covering an area of 241,000 square kilometres and a distance of 12,060 kilometres, interlinking the seventeen lakes in the province and taking source in the mountainous ranges at the borders of Kalimantan, Sarawak and Sabah. The province of East Kalimantan is also home to a remarkable wealth of biodiversity, with over 3,000 types of trees, 1,000 types of fern, 133 mammal species and 11 primate species identified. 60% of Kalimantan's mammals are found in East Kalimantan.

East Kalimantan attracts significant domestic and national investment due to the lucrative potential of its natural resources. In the forestry sector, 8.1 million ha of forest have been acquired by timber companies (93 HPH and 25 HTI). In the mining sector, over 67 coal mining agreements (PKP2B) have been signed and just under 500 mining issues have been issued across the province to various companies, covering a total area of 3.08 million ha. In Kutai Kartanegara district alone (where PT REA Kaltim

Plantations is located), oil, natural gas and coal mining represent over 77% of the local economy,¹ with a foreign investment total of over \$68,000,000 in 2010.²

The development of plantations on Non Forest Cultivation Areas (*Kawasan Budidaya Non Kehutanan* - KBNK) in East Kalimantan based on the agreed East Kalimantan Spatial Plan cover an area of around 6,520,622.73 ha. 1.2 million ha of land have been allocated with plantation business permits (*izin usaha perkebunan* – IUP) for large scale oil palm plantations, of which 392,605.22 ha have been leased

■ 'Fallen oil palm fruit are the life force of the company':
signpost in PT REA Kaltim Plantations concession /
Sophie Chao



as Business Use Rights (*Hak Guna Usaha* – HGU). Expansion since 2005 has been relentless, with an increase of 30% in the last seven years, and a further 4.7 million ha projected for conversion by 2025.³ All existing large-scale oil palm estates are controlled and operated by approximately 330 companies. Based on data released by the Plantations Office of East Kalimantan Province in 2010 and by the Central Bureau of Statistics of East Kalimantan in 2011, the total area of oil palm plantations in Kutai regency in 2010 was 123,673 ha, of which 109,460 ha are operated by private sector companies. In 2010 the total area of plasma across Kutai's oil palm plantations was 14,188 ha.⁴

A range of negative ecological and social impacts have resulted from the ill-regulated acquisition of land for natural resource exploitation in East Kalimantan. These include a deforestation rate of 300,000 ha a year, increasingly frequent flooding and landslides, as well as serious water and air pollution. A large proportion of Kutai Kartanegara's forest cover was also severely burnt during the 1982-83 and 1997-98 forest fires.⁵ Illegal land clearance for timber collection led to the cancellation of 146 location permits for a total area of 2.5 million ha by the provincial government by 2002.⁶ Land conflicts between local communities and companies have been compounded by conflict between and within communities, as a result of indiscriminate land allocation to private sector investors without due recognition of local communities' rights to land under regional laws.

Kutai Kartanegara district, where the PT REA Kaltim Plantations concession is located, is one of the richest districts in East Kalimantan, with an annual revenue in 2012 predicted at 6.5 trillion rupiah.⁷ It covers an area of 27,263.10 km² and is divided into eighteen sub-districts and 225 villages with a total population of 626,286. Kutai Kartanegara district borders Malinau district in the north, North Penajam Paser district in the south, West Kutai district to the west, and East Kutai, Kota Bontang and

Selat Makassar district to the east. From the 1970s onwards, a large portion of timber produced by Kalimantan originated from today's Kutai Kartanegara (particularly commercial species such as Meranti, Keruing and Agathis) and were transported down the Mahakam river.⁸ Although rich in natural resources, particularly forestland and gold and coal deposits, the revenues from the growing exploitation of these natural resources remain unevenly distributed by the central government and rates of poverty among the local population are high, compounded by limited infrastructural development, even in the case in Kutai Kartanegara, where most of the physical infrastructure and industrial facilities established in the original district of Kutai formerly existed.

History, peoples and customary land tenure

East Kalimantan is the former location of the oldest Hindu kingdom in Indonesia, Kutai, whose history is usually divided into two periods: the early Kutai Martadipura phase (circa 350–400 AD) and the later Kutai Kartanegara phase (beginning circa 1300 AD).⁹ The existence of the Kutai Martadipura kingdom is attested to by seven stone pillars, or *yūpa* (sacrificial posts), found in Kutai, Kaman Estuary, near the Mahakam river, bearing an inscription in the Pallava script.¹⁰ Kutai was later a tributary of the Javanese kingdom of Majapahit in the late thirteenth to sixteenth centuries.

The Sultanate of Kutai Kartanegara was established in the region of Tepian Batu or Kutai Lama, the capital of which was Tenggarong on the Mahakam river, upstream of Samarinda, the modern capital of East Kalimantan province. Kutai Kartanegara was later merged with Kutai Martadipura as the kingdom of Kutai Kartanegara Ing Martadipura. The attack on Makassar on the island of Sulawesi by the Dutch East India company in 1667, which led to the downfall of the Bugis kingdom

of Gowa, triggered a migration of Bugis communities to Kutai, where the Kutai Sultan allowed them to settle in Kampung Melantai, later developed (largely by the Bugis) into the town of Samarinda.¹¹ The arrival of the Bugis also marked the beginnings of intensified Islamic influence in East Kalimantan, with the first Islamic ruler being instated in 1732.

The first Dutch visitor to the Kutai Sultanate is reported to have arrived in 1635 and signed a trade treaty with the Sultan, although it was only from 1844 onward that the Sultanate of Kutai came to be regarded as a(n unruly) protectorate of the Dutch East Indies under the Dutch Borneo Southern and Eastern Division (*Bornero's Zuider- en Ooster-Afdeling*).¹² Nearly a century later, with the invasion of the Japanese, the Kutai Sultanate was acknowledged as the 'Kooti kingdom', subject to the Japanese Emperor.¹³ Three years later in 1945, Kutai joined the East Kalimantan Federation and became part of the United Republic of Indonesia in 1949. In 1959, the Kutai Special Region (*Daerah Istimewa Kutai*), represented by Sultan A.M. Parikesit, was abolished and, in line with Law No.27 of 1959, the region was divided into three second-level regencies: Kutai Kartanegara Regency, West Kutai Regency and East Kutai Regency, all of which became districts (*kabupaten*) in November 1999 in accordance with Law No.47/99.¹⁴

Peoples

The population of East Kalimantan is a highly heterogeneous mix of indigenous Dayak (including Dayak Kenyah and Dayak Tunjung) and Kutai, and other migrant ethnic groups such as Javanese, Chinese, Banjar, Bugis and Malays. In Kutai Kartanegara, over three quarters of the population inhabit the rural areas, mostly close to the Mahakam river and its tributaries, on which they continue to depend largely for transportation and economic activities. Altogether, some

eighty separate regional languages and dialects are spoken in East Kalimantan.¹⁵ The traditional language of the region is referred to as Tanggarong Kutai Malay, which belongs to the Austronesian language family and is part of the Sunda–Sulawesi languages branch, together with Malay and Iban as well as Buginese. Other local languages spoken upstream include Kenyah and Kayan.

The Dayaks, who are now mostly Christian, tend to inhabit villages close to or within forested areas, and depend principally on shifting agriculture and the collection of products from the forest. The Dayak in East Kalimantan have been classed into nine large sub-groups: the Kenyah, the Bahaus (further sub-divided into the Busang, Bahau Sas and Bahau Modang) the Kayan, the Benuaq, Tunjung, Ohen, Bentian, Punan and Lon Dayeu. Urban and coastal parts of rural East Kalimantan are primarily occupied by the Kutai, as well as Bugis, Banjar, Chinese, Javanese, Balinese, Batak, Minangkabau, Madurese and other incoming ethnic groups. The Kutai, descendants of the Kutai Sultanate, are predominantly Muslim and have tended to dominate local bureaucracies from the provincial to the district levels, and sometimes down to the village level, even where the population is majority Dayak. The Bugis of south Sulawesi are the second largest ethnic group in East Kalimantan (after the Javanese) and have historically dominated economic activities in the region, particularly through trade.¹⁶

While the Dayak and Kutai are officially recognised as the 'natives' of East Kalimantan, various ethnic groups have co-existed in the region since long before the Dutch colonial period. Under the Kutai Sultanate, for example, Dayak, Bugis and Chinese were active in the ruling administration, and this multi-ethnic power sharing was continued throughout the Dutch colonial period. However, decades of State-sponsored transmigration programmes, as well as what is perceived by locals as the process of 'Javanisation' of the region

has created ethnic segregations as well as inter-ethnic competition over land, natural resources, and political representation and voice. The Dayak of the rural and forested interior, in particular have lost out heavily to the Kutai and newcomers such as the Bugis, Javanese and others.¹⁷

While inter-ethnic tensions have been reported within the concession, particularly in relation to land rights,¹⁸ the sensitivity of the issue and the short period of fieldwork for this observation exercise made it difficult to ascertain this from the field. A number of discussions with community members revealed a notable distinction made by Kutai people between themselves and other ethnic groups, such as the Dayak, particularly in relation to religious affiliation and culture, such as burial practices and sacred sites.

Land tenure

Land was customary held collectively by the Dayak peoples and inherited evenly among children. Swidden agriculture was practised as well as rice paddy cultivation, complemented by the gathering of forest products and fishing for consumption and trade.¹⁹ The clearing of unclaimed primary forest gave rights of use in perpetuity to the clearer, but rights to land could be customarily transferred from original rights-holders to others usually in return for a 'goodwill payment' or 'token of appreciation' (*tali asih*). Land clearance in the forest required permission from *adat* leaders, particularly where this was carried out close to ancestral graves and other sacred sites. Since the arrival of timber and oil palm companies, however, land is increasingly held on an individual basis, even among the Dayak, with several community members selling part of their land to incomers from other parts of Indonesia. However, the individualisation of tenure has not been accompanied by the formal affirmation of these rights. Most communities do not hold Land Statement Letters (*surat pernyataan tanah* – SPT), let alone land titles.

The lack of recognition of customary rights to land in law was pointed out by several community members as a root cause of today's disintegration of the communal land tenure system they traditionally practiced, and the allocation of concessions to private sector companies (timber and oil palm) without consultation with, or the consent of, the communities who have customarily owned, occupied and used these lands for their livelihoods.

The approach of the government is not pro-people enough with regards to these investment projects. Our understanding is that both the timber company and the oil palm plantation are present in our villages because of government approval. But this approval itself does not reflect or take into consideration the communities' land rights. (statement from village head of Kembang Jenggut, reiterated by village head of Perdana Village and various community members)

We don't really know if we have customary lands today any more, in the way we used to define it. There are no lands where the State's intervention is not felt, or where we have complete discretion in managing our land collectively. (community member)

Many of us Dayak have sold our land to incomers, such as the Javanese. But we should not do that, because then we will really have nothing left. (Philipus Njang, Pulau Pinang)

The gradual disintegration of customary laws and the practice of *musyawarah*, or village consultations, as a means of collective decision-making and consent-seeking, were also pointed out as a causal factor of the loss of customary lands by the communities.

I regret that we could not use our customary laws back then to face the company, and claim our rights to land based on our laws. We did not have the opportunity to write them down, as we should have done, because if we had, we could have used them as the justification for our claims to land in the face of the company. We should have been given the opportunity to use our laws in defending our rights. (community member)

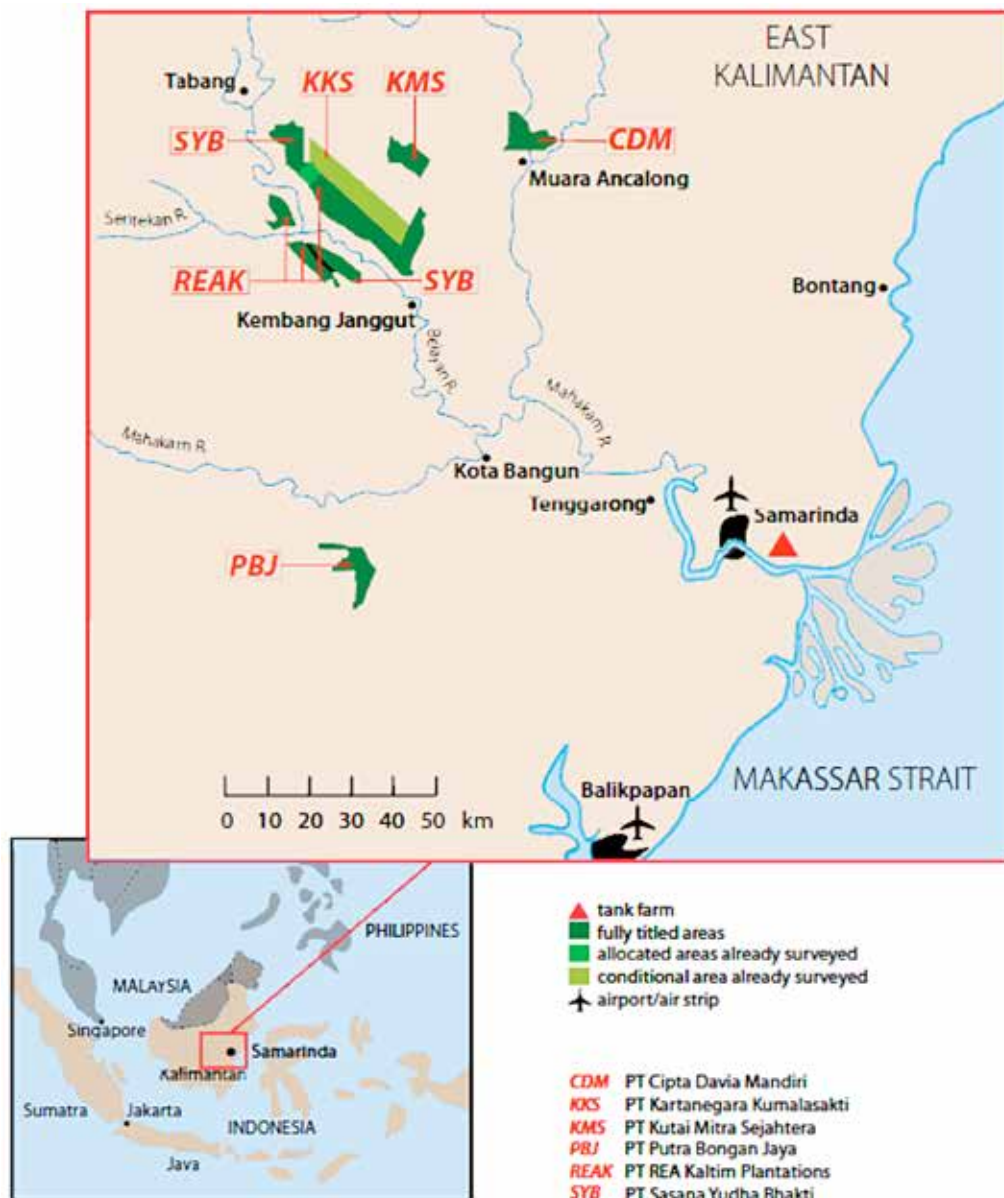
PT REA Kaltim Plantations' operations

PT REA Kaltim Plantations is located primarily in Kembang Janggut sub-district of Kutai Kartanegara district (138 kilometres west of the capital of East Kalimantan, Samarinda) with a smaller part located in Tabang sub-district. It is one of six oil palm concessions in East Kalimantan owned by REA Holdings PLC, a British company listed on the London Stock Exchange. REA Holdings PLC finds its origins in a London-based plantation agency house called The Rubber Estate Agency Limited (hence REA), established in 1906, and is reportedly one of the first British companies set up for the purpose of financing the acquisition of rubber estates and of acting as secretaries

and agents of rubber and other plantation companies.²⁰

In 1989, the group set up an office in East Kalimantan and commenced negotiations to obtain a land concession. By 1991, provisional allocation of a suitable site for planting had been obtained on land formerly part of a concession operated by timber company PT Limbang Ganesa under a Forest Product Harvesting Permit for Industrial Timber Estates (*Hak Pengusahaan Hutan Tanaman Industri* - HPHTI).²¹ In 1992,

■ Location of REA Holdings PLC oil palm concessions in East Kalimantan. (Source: REA Holdings PLC Annual Report 2011)



the first nurseries were established, and planting began in 1994.²² PT REA Kaltim Plantations joined the RSPO in 2007.

As of 31st December 2011, the REA group held agricultural land allocations in East Kalimantan totalling 97,698 ha of which 70,584 ha were fully titled. 30,106 ha are held by PT REA Kaltim Plantations.²³ The land allocations comprise a core area on either side of the Belayan river (PT REA Kaltim Plantations, the group's principal operating subsidiary) together with satellite areas located within reasonable proximity of the core area. The operations produce Crude Palm Oil (CPO), Palm Kernel (PK) and Palm Kernel Oil (PKO). As of 31st December 2011, the areas planted with oil palms or in course of development amounted to 37,084 ha of which 25,415 ha were mature.²⁴

The group intends to plant oil palms on all suitable undeveloped land available to the group (other than areas set aside by the group for conservation) in accordance with the RSPO New Plantings Procedure (NPP).²⁵ In addition to oil palm plantations, REA Holdings PLC has also acquired rights with respect to three coal concessions in

East Kalimantan (Liburdinding, Muser and Kota Bangun) where it is developing an open cast coal mining operation.

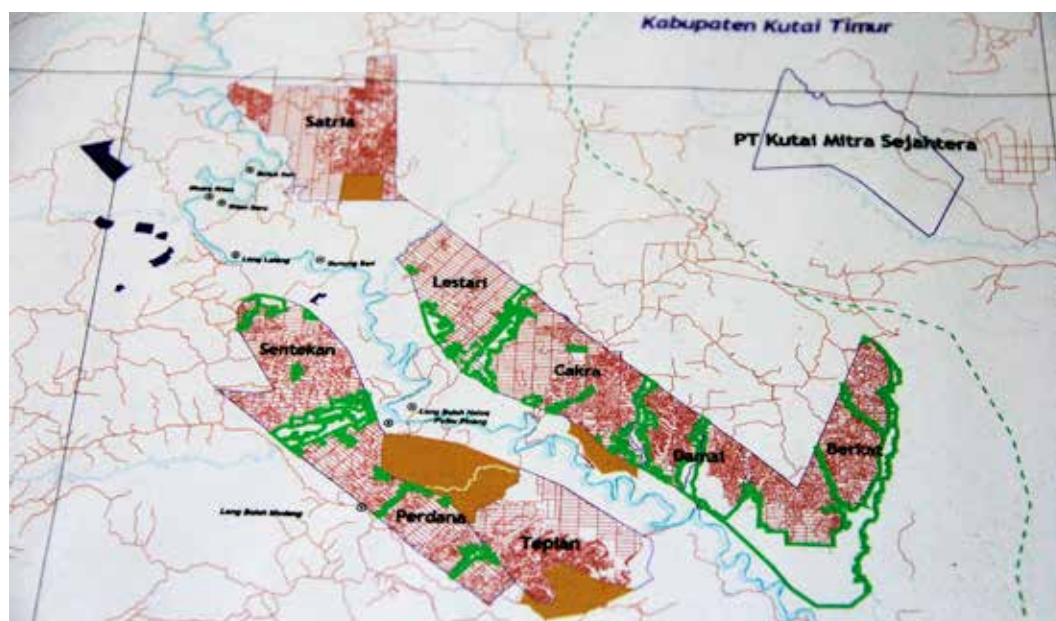
PT REA Kaltim Plantations is composed of two mills (PO1 Perdana POM and PO2 Cakra POM), a supply base of six estates, a Plasma Scheme and an Independent Smallholders Scheme, or PPMD (*Program Pemberdayaan Masyarakat Desa*).²⁶ The six estates of the PT REA Kaltim Plantations concession are: Perdana (3,850 ha planted), Lestari (3,849 ha planted), Sentekan (4,008 ha planted), Cakra (4,675 ha planted), Damai (2,005 ha planted) and Berkat (4,460 ha planted).

	Total area (hectares)
PT REA Kaltim Plantations	30,106
Conservation areas	5,363
Plasma scheme	1,905 ²⁷
PPMD scheme	1,561 ²⁸

There are nine villages within the PT REA Kaltim Plantations concession as follow:²⁹

1. Long Beleh Haloq
2. Long Beleh Modang
3. Muai
4. Pulau Pinang
5. Perdana
6. Bukit Layang
7. Kelekat
8. Kembang Jenggut
9. Long Lalang

■ Location of PT REA Kaltim Plantations estates, conservation areas and plasma



No 03/95, 6th September 1995 (Lestari).
No 01/98, 10th January 1998 (Damai and Berkat).
No 02/99, 26th August 1999 (Cakra).

Community perspectives

The NGO consortium visited five villages (Hambau, Kembang Jenggut, Muai, Perdana and Pulau Pinang) in Kembang Jenggut sub-district within the PT REA Kaltim Plantations concession.⁴⁵ These villages are located along the Belayan riverbanks and the tributaries of Sentekan and Lurah. During the visits, the NGO consortium interviewed community members as well as village representatives, including village heads, political party representatives and heads of village households (RT – *rukun tetangga*). It was not possible to visit all the villages in the concession due to time constraints and poor road conditions during the rainy season.

With regards to Free, Prior and Informed Consent (FPIC) in the early stages of the company's operations (early 90s), it appears that information conveyed to communities was limited to statements by the company of its intention to develop an oil palm plantation in the area, and an invitation to some (not all) villages to join the PPMD scheme, and later the plasma scheme in 2007. A number of community members confirmed that the company has since then taken measures to develop the villages' infrastructure (eg provision of generators, drinkable water, building of clinics, mosques, churches and schools, and building and maintaining roads) for which they are grateful. Some of the village heads interviewed held copies of maps, plasma agreements and compensation receipts from the company, but the majority of community members did not possess or had not seen copies of these documents. High Conservation Area Assessments (HCVAs) and Social Impact Assessments (SIA) were not held by any community members interviewed. A notable complaint on the part of several was that the company tended to rely on the village head and the

village team to convey information to the wider community, but that this was not being realised in practice.

While community perspectives were varied, the overall findings show that most communities do not object to the presence of PT REA Kaltim Plantations and do not feel that their access to land and resources have been significantly affected by its activities. The main grievances expressed were the lack of realisation of promised plasma, unpaid compensation for land lost, and lack of information from the company regarding their activities and communities' right to FPIC. A number of protests have taken place as a result of unfulfilled promises of plasma and compensation – a 25 day road block had just ended on the first day of the observation assessment.

From community statements, it appears that while a process to realise communities' rights to FPIC in the earlier stages was lacking, a number of initiatives have been taken by the company since then to benefit the local communities within the concession. Local communities expressed hope that they could continue to benefit from the company's presence, in particular through the realisation of plasma. Improved communication channels (without reliance on the village head and village team alone) were pointed out as a key area for improvement in relations between communities and the company.⁴⁶ On a less positive note, it was apparent that *sosialisai* and communication in general is not evenly carried out in all the villages within the concession, leading to confusion and a degree of frustration for those which have been offered fewer opportunities and less development support.

FPIC in the early years

In 1992 – 1993, PT REA Kaltim Plantations began identification of lands suitable for cultivation, a process which was accompanied by the identification of existing land owners and users. This

process of identification was carried out with the direct and ongoing involvement of governmental bodies at the levels of the district, sub-district and village. Land release teams (*tim pembebasan lahan*) and negotiation teams were formed in each village by the village level government in order to facilitate the process of land identification and release, as well as to demarcate boundaries and collect evidence of land ownership and use, such as in the form of land titles. The historical context of the time (the New Order) implied that the role of the government in the identification of land was dominant, from the level of the province, district, sub-district and village, and only after that, to the level of the communities and individuals involved.⁴⁷

*Sosialisasi*⁴⁸ was only carried out once in 1992 - 1993, after which the company carried out land measurement and clearing on communities' lands, accompanied by the payment of compensation for land, and sometimes crops.⁴⁹ *Sosialisasi* at this point consisted of the company explaining its project of developing an oil palm plantation, as well as making a number of promises to communities, such as the opening up of cultivation land, employment opportunities, village development and empowerment, and so forth. Agreements made, and notes of the *sosialisasi* meeting were given to the village head, who was in turn responsible for sharing these documents with the wider community.

Payment of compensation (*tali asih*) was facilitated by government officials, in line with the company's Standard Operating Procedures (SOP) on compensation payment, and paid directly to the village head, who, as village representative, was responsible for distributing the money to individual households. Official reports were kept of compensation payments, accompanied by photographs and formalised through local government council meetings (*jajaran muspika/musyawarah pimpinan kecamatan*).

The village of Perdana, inhabited by 439 households (1,360 individuals) of various

ethnic groups (Javanese, Bugis, Kutai, Toraja, Chinese and Flores) was the first village contacted by PT REA Kaltim Plantations when it arrived in the area to open up its oil palm plantation in 1991.⁵⁰ Land clearing began in Perdana as early as 1993 - 1994.⁵¹ An oil palm nursery was reportedly then set up on the land of Perdana. However, consequent expansion of the company's land to the current 3,946 ha was said to have been carried out without consultation or communication with the community.⁵²

Even at the time, we were not sure how PT REA obtained the land from us. All we know is that they arrived and told us that this was to be their HGU. This was at the time of the New Order, so the government took a lot of decisions in our place. PT REA Kaltim Plantations' nursery was established on community-owned crop gardens and fields. After that, the company expanded its area into forest within our customary land. (Village head, Pak Kasmani)

In Hambau village,⁵³ community members interviewed did not recall participating in any *sosialisasi* activities carried out by PT REA Kaltim Plantations in 1992 when they first arrived in the area. The first contact established with the company was in 2006 - 2007, when PT REA began clearing land within the village's area (*wilayah desa*), in some cases without prior warning. Land clearing with heavy machinery was reportedly carried out up to the shores of Hiran, Kenohon, Lurah and Hapai rivers.⁵⁴

PT REA took some of my land, which I had planted with rubber trees. The trees were already pretty tall, there were around 300 of them, and they were destroyed. I was too scared to say anything because I knew that BRIMOB [military mobile brigade] was around. I couldn't take my case to the company, or anyone else, because my trees were the evidence, and they had been destroyed. (Pak Ridwan⁵⁵)

Some of us found out that our land had been cleared in the morning when we went to our paddy fields and gardens. To us, the grabbing of our land without warning is the most outstanding problem. (community member)

The company states that *sosialisasi* was not carried out in Hambau as it is not part of the company's HGU. The mapping being carried out by Muspika survey team to produce a definitive map will confirm at a later stage which villages have rights to land within the PT REA HGU. The company has stated that if the map shows that Hambau does have village land within the company's HGU then they will need to adjust plasma allocation accordingly.

In Kembang Jenggut, a village to the south-east of the PT REA concession inhabited by around 986 households, around 500 ha of land were reportedly taken by PT REA Kaltim Plantations without prior warning or consultation. In 2006–2007, compensation for lost land was offered (600,000 Rp per ha) but communities protested as this did not include the cost of lost crops and fruit trees on the land taken by the company.

An interview with 68-year old RT1⁵⁶ head Philipus Njang from another village, Pulau Pinang, inhabited mainly by Dayak Tunjung, confirmed that there too, very little, if any, *sosialisasi*, had been carried out in the 1990s.⁵⁷ In Muai, a village inhabited by around 1000 households of various ethnic groups (Bugis, Kutai, Dayak), community members reported that the company representatives who first visited the village asked the community to sell their land to them and get plasma in exchange.⁵⁸

They took seven hectares of my family's land without compensation. Before that, we were free to use our land as paddy fields and gardens. How can we manage our customary lands if they are taken by PT REA? (Pak Wahidu)

In Kembang Jenggut,⁵⁹ the village head, Pak Aslan,⁶⁰ confirmed that the consent of communities was not sought at the time, rather the company announced its intentions to the communities, as well as potential benefits that could be gained by local communities from the development of oil palm plantations. No community members were aware of maps or participatory social surveys carried out at the time. The lack of identification

of clear borders of the concession at this early stage was also pointed out as a major cause of conflicting land claims (as well as occasional opportunism) by different communities and within communities.⁶¹

Without maps, it is like we are blind. (Pak Ridwan)

Our customary rights have never been accounted for in the form of maps. (Pak Aslan)

One of our demands is to re-measure and re-demarcate the boundaries of customary land and of the concession. (Pak Aslan)

We don't really know where the borders of the concession are, so we don't know how much of our land falls within the concession.

To date, it appears that most communities are unaware of the legal status of the company's operations, including in relation to the location and terms of the five HGUs obtained by PT REA Kaltim Plantations. Most community members are not clear as to the nature of PT REA Kaltim's operation, its organisational structure, and the terms of its operations on their customary lands. Many pointed out that it would be better if the allocation of permits was done in collaboration, or at least in consultation, with potentially affected local communities. In response to this point, the company states that all allocations of land for development for oil palm went through the (Environmental Impact Analysis (AMDAL) process and that a Panitia B process was also done before HGU titles are obtained, which are community approvals of the intended projects. However, it is reported that most of the village elders have either passed away or migrated to the towns, taking their understanding and information on these developments along with them.

Compensation

Most community members in Hambau have yet to be compensated for the land they claim to have lost to the company four or five

years ago and they were unaware of whether the company has a SOP for compensation payment. They are also unsure who to turn to with their claims, as government bodies approached have failed to respond.

The provincial government closes its ears to our claims. No investigations have been carried out in the field to verify our claims either. (community member)

The community of Kembang Jenggut was also in protest at the time of writing over lack of compensation for land and crops lost to the company seven years ago. They demanded 15 billion rupiah from the company, the equivalent of lost income from the land lost over seven years, a sum that they then decreased to 10 billion rupiah.

In Muai village, compensation and the realisation of plasma were the main demands from protesters. 3.5 million rupiah had reportedly been promised by the company to the village in an oral agreement but never given. Now, the community is asking for fifteen million rupiah, which they report is in line with the value of the land they have lost. Furthermore, certain community members reported that some compensation was claimed as already paid by the company, but that they had never seen receipts or the money itself.

Maybe the village team or the cooperative have the receipts, but the point is we don't know, and we don't know where the money is.⁶² (Pak Wahidu)

The Muspika survey team is currently working on determining which claims of outstanding land compensation are valid and which are spurious.

Plasma scheme

According to company representatives interviewed, the plasma scheme implemented by the company is a One Roof Management Partnership (*Kemitraan Manajemen Satu Atap*), for which a Plasma

Department has been set up by the company. The responsibilities of the department are to provide training to plasma scheme members via two cooperatives: Kahat Bersatu (for Pulau Pinang, Perdana and Bukit Layang) and Etam Bersatu (for Kelekat). According to the CUC audit, the plasma is managed and developed by a 'plasma team' appointed by the company. The first plasma areas were planted in 2009 and are planned to come into production in 2012. The target is to develop an area of 4,700 ha which is equivalent to 20% of the HGU area.

Interviews in various villages revealed that most are keen to benefit from the presence of PT REA in the form of plasma. Some villages were offered plasma by the company in 2007 and 2008 and hold signed agreements with PT REA Kaltim Plantations (such as Perdana, Kelekat and Pulau Pinang). But other communities have complained that they had to take the initiative to approach the company and request plasma, rather than the company informing them of the possibility of benefiting from their activities through the plasma scheme.

In Hambau, for example, community members were confused as to why plasma was not offered to them by the company, and why the community has had to request it from the company after finding out what it consisted of through their own channels of information. No *sosialisasi* activities were reportedly carried out and most community members found out about plasma in 2012 through their own means (including from legal sources such as regulation Permentan 26/2007).

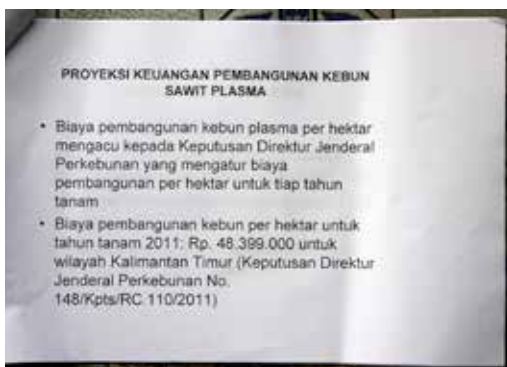
PT REA began operating in 1994, but plasma only started this year, and not in our village. We already have plasma with PT PTS [a neighbouring oil palm company] and they are much more recent, so we don't understand. How come we have to look for information on our own and demand for our rights to be realised? (Pak Ridwan)

With regards to plasma, the company states that under the regulations applicable prior to 2007, they were not obliged to provide



■ Village head of Kembang Jenggut shows the agreement between PT REA Kaltim Plantations and Kembang Jenggut for the realisation of plasma / Carlo Nainggolan

approached the company to request plasma, after finding out about it from other villages who were protesting against the company for failing to implement it.



■ Detailed information about the plasma scheme was only conveyed to Kembang Jenggut in June 2012 / Carlo Nainggolan

The situation was reversed. It should be PT REA who approaches us as this is their responsibility. (Pak Aslan)

plasma for the villages owning land within the concession as these areas were developed prior to 2007. However, the company reports having offered communities with access to land the opportunity to become involved in a different smallholder scheme through their PPMD programme, but that there was only limited uptake of this offer.

Likewise, the village head of Kembang Jenggut states that the community

According to the village head, 500 ha of plasma, in the form of a *kemitraan* agreement, was promised to the community in 2006, but has not been realised to this day. Under the agreement, the community would be provided with seeds, fertilisers, pesticides and so forth for the planting of oil palm. An examination of two agreements with Kembang Jenggut, held by the village head, however, show that the plasma agreement does not have legal weight as yet, as the company has, so far, only 'promised to help the community of Kembang Jenggut in plasma plantations'. The same commitment was made in two consecutive agreements (17th April 2006 and 9th March 2007). Details on the nature of the plasma scheme (eg duration, location of plasma, status of the land upon expiry of the HGU and so forth) have not been included in these agreements to date, and it appears that the community is wrongly interpreting these documents as formal plasma contracts, upon which they are

basing their claims. Information-sharing on plasma was only carried out in 2012, according to the village head, and confirmed by a document detailing the nature and terms of the one-roof management plasma scheme, dated 28th June 2012. The village head was unaware of where the plasma land would be located; a map has reportedly been produced following a land identification process in 2012, but he did not have a copy.

In some villages (Kembang Jenggut and Muai in particular), it appears that collective *sosialisasi* with the communities was only implemented around 2007, when the company introduced the plasma scheme. Since then, however, very little consultation and contact have reportedly been undertaken.

Sosialisasi happened at first, a few times, but we have no idea what's happened since then. It hasn't really been an iterative process. (Pak Wahidu)

The situation in the village of Pulau Pinang was by far the most encouraging in terms of realisation of plasma. According to one community member (and head of RT1), two ha had been received by most community members, as well as help in the form of seedlings and training. The plasma MoUs held by community members of Pulau Pinang have been signed by the Bank of East Kalimantan as the lender and financier of the plasma development and the cooperative as the representative (legal entity) of the farmers, as well as the company as the guarantor (avalis). The MoUs clearly state the development cost for each hectare of land as 39 million rupiah (with yearly variations) due to fluctuating costs of land clearing, seed purchase, maintenance, fertilisers, pesticides, and so forth. Under the MoU, the farmers are to settle their debts by monthly installments in the form of deductions from their earnings, over a period of 15 years.

Perdana has not taken part in any protests, and the general impression given was that the community is happy with the presence of PT REA as they are able to benefit economically from it.

We can get three to six million rupiah per month from two hectares, which is enough to live off and support our children to go to school. We have never fought with PT REA. They have brought us a lot of development support too, such as clinics, which are free for PT REA staff and workers, as well as their families. Most of us here are employed by PT REA at different levels, or are part of the plasma scheme. (Pak Philipus Njang)

In Muai, the PPMD scheme also appears to be well accepted by local communities. In this scheme, community members are provided with seeds, fertilisers and pesticides by the company, and have written contracts according to which they sell their fruit to PT REA via a cooperative (Belayan Sejahtera). The cooperative has grown from 33 farmers to over 180 in the last few years, and it keeps copies of all receipts, contracts and payments on behalf of its members.

Also on a positive note, a significant amount of community development support has been provided by PT REA Kaltim Plantations to a number of villages, including Pulau Pinang, Perdana and Muai, in the form of generators, clean water, clinics and schools.⁶³ Electricity is also provided by the company to Pulau Pinang for free between 5 pm and 6 am. While the community of Hambau stated that very little development aid had been provided by the company compared to other villages (and this was confirmed by the company).

Access to information

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A main complaint on the part of community members in all villages visited was the lack of information provided to them by the company regarding its operations, and regarding community members' rights – to compensation, to plasma and to FPIC. Improved channels of communication was a recommendation made by all six communities interviewed.

In Hambau, for example, community members stated that they had to look for such

information on their own through channels other than company representatives. Limited information sharing by the village head and involved *adat* leaders was also reported.

Maybe the company communicates with the village head and other high level functionaries at the village level, but they don't communicate with us [the community]. We are not sure who we should blame for the problems; the company, or our own representatives. (community member)

We found out about Permentan 26/2007 from listening to the media, from watching television, from ear to mouth. The information we have about this, and other aspects of the company's operations, are extremely minimal. We have heard about the RSPO, but not from the company. I only found out what HGU, plasma and INTI are from a friend who works at PT REA, and he told me that this was confidential information to be kept secret. I'm not sure if that is true or not. And that was in 2010. (Pak Ridwan)

We blame our ignorance and lack of education for not knowing about our rights. (community member)

It's like we've just woken up to realise that we have rights. (community member)

We are still not brave enough because we are unsure of our rights, but we are becoming braver. (community member)

The establishment of village teams (*tim desa*), village border teams (*tim batas desa*), plasma teams (*tim plasma*) and discussion teams (*tim perundingan*, also known as Tim 42 in Kembang Jenggut) to act as intermediaries between the company and communities was seen as problematic by many community members for a number of reasons. First, many were unsure who the members of the village team were in the first place, as this had not been socialised to them. Second, several people complained that the village team was only activated when problems arose, rather than playing an ongoing monitoring role. Third, information was not always being communicated by the teams to the

wider community in due time, particularly information about the implementation of the plasma scheme. As such, it was reported that communication channels with PT REA needed to be both increased and better monitored by the company to make sure full community involvement was achieved.

The teams have to be more pro-active in contacting us and communicating with us. Otherwise, our impression is that the company behind them is stone faced and stone eared to our demands (*bermukakan tembok, bertelingakan batu*). (Pak Aslan)

Sometimes, when the company meets with our representatives, they take them to Samarinda or Tenggarong for the meetings, which is a problem for the rest of the community who are not present. (Pak Muhammad Lukman)

With regards to documentation, in two villages, the village heads were in possession of a number of relevant documents, including maps and plasma contracts (Kembang Jenggut and Perdana). These include maps of the concession estate boundaries, border demarcation agreements on conservation areas in Kembang Jenggut, a map of land classification from the Ministry of Forestry, an agreement for the establishment of a village team from 2006, and various agreements on payment of compensation for land lost. However, most community members did not know about or have copies of HCVA, Environmental and Social Impact Assessment (ESIA), AMDAL or maps produced by the government or the company. None of the community members interviewed had heard of FPIC.

In one village (Muai), it was reported that the community had been involved in participatory mapping with PT REA, but that this map was to be used to identify land for clearing, not customary rights or plasma. No community members interviewed were aware of any SOPs of the company in relation to the recognition and demarcation of customary lands, conflict resolution mechanisms or multi-stakeholder communication mechanisms.

The administrative map produced by the Forestry Office had reportedly not been shared by the village government, or actively used to help the rights of communities to land to be recognised in practice. The provincial National Land Agency has reportedly mapped the customary land of Kembang Jenggut within the PT REA Kaltim Plantations concession, but community members reported that they have not received copies of this map.

Without maps, we are unclear of the boundaries of the concession, and how our own customary lands fit within that. Even though we know that some of our land has been taken, we cannot base our claims on concrete maps, and that makes it very difficult for us. (Pak Ridwan)

Communities need to know their rights. The company and the community must engage in dialogue so that the company can know the needs and aspirations of the community, as well as why the land matters to them. And this must be a reciprocal process for things to go forward in a way that respects rights. (Pak Aslan)

Several community members also complained of a lack of information imparted to them by the company and the government regarding their rights under national law. Several saw this as the responsibility of both parties.

We don't understand the laws, so we don't understand our rights. We cannot really voice our views because we lack information. Only now we are beginning to get information through our own means, and becoming braver to open our mouths. (Pak Ridwan)

The government knows the laws but we don't know our rights under these laws. To be honest, we feel that the New Order regime is still ongoing on our lands. (Pak Ridwan)

In Kembang Jenggut, several community members were confused as to the location and extent of the company's HGU, and as to whether plasma land should be within or outside it. A particular complaint has already been raised by the village of Kembang

Jenggut at the level of the Plantations Office and the District Secretary over this issue, and the community is in negotiation with the company over clarification of the area and boundaries of customary land of Kembang Jenggut within the PT REA Kaltim Plantations concession.

Only one village (Perdana) had heard of the RSPO from company representatives, but the term FPIC was unknown to all community members interviewed.⁶⁴ Lack of knowledge of RSPO among plasma and PPMD scheme stakeholders was also identified as a non-compliance in the CUC report.

Another problem raised by communities (Hambau and Kembang Jenggut) in relation to communication channels with PT REA Kaltim Plantations was the frequent change in staff and company representatives, leading to confusion as to who to turn to when problems arose, and delays in response on the part of the company as new staff needed time to get to terms with ongoing issues.

Sometimes we feel we are getting somewhere with one representative, and our problems are being resolved, but then the staff change, and we have to repeat the whole story again. It makes the process longer. (Pak Aslan)

This problem was also raised by community members of Perdana, who noted that, frequently, agreements signed between the community and the company were signed by the company representative involved, but not stamped with the company's

■ *Meeting with village representatives in Perdana / Agus Wiyanto*



official stamp. As a result, on a number of occasions, changes of staff meant that these agreements were no longer acknowledged by the company, as they were signed in the name of past management staff. A demand of the community was thus to formalise agreements and contracts by formalising them with use of the company chop (stamp), rather than signatures alone. In relation to this point, the company states that it now has a company policy in place that all agreements and contracts have to be approved and signed by the President Director.

Protests

A number of protests over unresolved plasma and compensation were reported by community members within the PT REA Kaltim Plantations concession. These include a protest at one of the company's mills in May 2004 by Muai village⁶⁵ (causing the temporary shutdown of its operations) and in 2011 by Ritan Baru and Gunung Sari community members due to pollution of the river by company waste effluents.⁶⁶ At the time of writing, three villages (Long Beleh Modang, Muai and Kembang Jenggut) had blocked five company roads within the concession in protest for 25 days, ending the blockade on 8th July 2012.⁶⁷ PT REA Kaltim Plantations has reportedly agreed to offer compensation in the amount of 70 million rupiah to the protesting communities, but there was no formal agreement for this at the time of writing.

According to a number of community members, these protests have had a cumulative effect, as other villages gain awareness of their unfulfilled rights.

One protest triggers another, as communities begin to realise that they can also claim plasma land and compensation for the land they've lost. (Pak Ridwan)

However, it appears that the communities have no intention of taking more drastic measures to bring their complaints to the company, as they generally hope that problems can be

resolved peacefully, and that they can benefit from the company's presence.

We don't want the company to shut down. We just want to be able to share the benefits with them, and see the promises made to us realised. When we protested, BRIMOB and the police came and told us not to cause any problems. We told them that this is not what we are trying to achieve. (Pak Wahidu)

Interestingly, a number of community members (in Hambau, Perdana and Pulau Pinang) did acknowledge that, while they do not want the company to leave the area, they also realised that they have become near completely dependent on its presence and on the economic opportunities that it may bring. According to representatives of PT REA Kaltim Plantations interviewed, approximately 1,500 people from surrounding villages work for them, with approximately 5,000 dependents. However, although they are benefiting from employment opportunities, several community members described this dependence as a result of changes to land use that were beyond their control.

We might not be discontented with the company's presence, and we are offered jobs, but the question is, do we really have a choice? And were we really ever given a choice? We don't have much land left to manage on our own. So we may support the company, but not really out of choice. There is no more forest, and no more land, so we have to look to the company as a source of income. (community member)

Customary rights and FPIC: The role of the government and the company

The government

Government representatives from the Kukar National Land Agency and the Forestry and Plantations Office interviewed in Tenggarong maintained that PT REA Kaltim Plantations' operations and legal conformance were satisfactory, and that economic opportunities provided to

local communities by the company were welcomed by the latter. Outstanding issues to be resolved, they note, were ‘problems, not conflicts’, and although the representatives acknowledged that conflicts had arisen in the past, they affirmed that the company had taken all necessary measures to remedy community grievances and provide compensation where legitimate claims were made.⁶⁸

The responsibilities of PT REA Kaltim from our point of view have been completed. The PPMD scheme has been realised. PT REA Kaltim is a good company. (Head of Forestry and Plantations Office, Kukar)

PT REA Kaltim does not have any outstanding responsibilities, as it has already implemented all its responsibilities. (Pak Sandi, BPN Office, Tenggarong)

However, it is interesting to note that the lack of involvement and initiative taken by the district government and relevant State agencies in terms of conflict resolution and mediation between the communities and the company was highlighted by several community members. One of them, for example, stated that, ‘instead of acting as a bridge between both parties, the local government is not maximising its authority, and is instead positioning itself as ‘goalkeeper’ rather than ‘team player.’ Similar comments were made with regards to the Local Parliament of Kukar District, who was said to ‘absorb the aspirations of the communities but not represent them in action’. On an encouraging note, it is reported that in June 2012, the Regent stated that his office would assist in dispute resolution and arbitration where necessary.

Numerous complaints with regards to unrealised plasma and unpaid compensation have been submitted by community members to the National Land Agency, the local Parliament and the Plantations and Forestry Offices, with very little response and no action. Discontent with the government’s lack of initiative and role in pushing for the realisation of promised plasma led to

protests at the district government’s office by community members of Tukung Ritan and Ritan Baru on 28th February 2012, prompting the regent’s representative to promise to convey the communities’ wishes to the Regent himself.⁶⁹

It was acknowledged by staff of the National Land Agency and the Forestry and Plantations Office that Kukar Regency lacks local regulations relating to conflict and dispute resolution. BPN relies instead on the Regulation of the National Land Agency Head No. 3 of 2011 on the Management, Assessment and Handling of Land Cases (*Peraturan Kepala Badan Pertanahan Nasional Tentang Pengelolaan, Pengkajian dan Penanganan Kasus Pertanahan No. 3/2011*). Conflict resolution mechanisms have, to date, taken the form of ‘ad hoc’ teams which are set up when and where the need arises, and relative to the nature of the conflict and the sector in question.

While a number of mapping activities have been carried out with the involvement of the National Land Agency Central and Sub-district Offices, the Plantations Office (Dinas Perkebunan), the Agriculture Office (Dinas Pertanian), the Forestry Office (Dinas Kehutanan) and PT REA Kaltim Plantations itself,⁷⁰ these have focused on the demarcation of HGUs, of conservation areas and of the boundaries of the concession, and not customary lands. While representatives of the National Land Agency recognised that mapping customary lands would help avoid further land conflicts and overlapping claims, they also stated that community members did not need to participate in mapping activities, and that it was enough for the outcomes of the mapping to be socialised to them afterwards. Representatives of the Kutai Kertanegara Forestry and Plantation Agency confirmed there are, to date, no Regional Government Regulations (Perda) for the protection of village community lands or customary lands.

Communities don’t need to participate further than *sosialisasi*. They don’t need to participate in mapping, or HCV assessments.

Finally, with regards to FPIC, while some government representatives interviewed reported not being aware of its meaning, others clearly equated FPIC with '*sosialisasi* by the company and the government to the people'. Similar statements were made with regards to the issuance of HGU, which, representatives stated, only required *sosialisasi* after the permits had been issued, to explain their purpose and terms to the communities. The notion of FPIC as a right, to be protected and realised through an iterative process of consultation, negotiation and dialogue, was deemed an over-statement by the government representatives interviewed.

Sosialisasi is only needed when a company starts to operate in an area, when the company and the government tell the people what they plan to do with the land. (Pak Sandi)

It is also interesting to note that the government representatives interviewed were not aware of the RSPO, of the Principles & Criteria, of PT REA Kaltim Plantations' membership to the RSPO, or of its recent certification.

PT REA Kaltim Plantations

The early stages of PT REA Kaltim Plantations' interaction with the local communities living within the concession appear to have consisted of information-sharing on the economic and social benefits of oil palm development, rather than consideration for the right of the communities to give or withhold their consent to the project development on their customary lands. In many ways, the measures taken since to recognise and support local communities' rights can be seen as a means of remedying this earlier lack of recognition of FPIC.

According to company representatives, local communities within the targeted concession area were identified and contacted via the village heads and sub-district head.⁷¹ In 1994 – 1995 (ie three

years after PT REA first identified the concession site but prior to the opening of land), information-sharing (*sosialisasi*) in the form of a main stakeholder meeting was held in Samarinda, and a number of follow-up meetings at the sub-district and village level, to which the main community representatives were reportedly invited. It was also around this time that village teams were formed by the company, involving community representatives such as village heads and *adat* leaders. Responsibility was given to this team to convey information from the company to the wider community. With the village team, the borders of the concession were demarcated and compensation for land lost by the community paid. According to company representatives, *sosialisasi* consisted of informing the communities that PT REA Kaltim Plantations was planning to open up an oil palm plantation in the area. The company also informed the communities that they would benefit from employment opportunities with the development of the oil palm plantation.

According to company representatives, most communities supported the land clearing process at the time. Planting was carried out in stages after the acquisition of the location permit in 1993 – 1994 and is ongoing to date. The PPMD scheme was first implemented in 1994, according to company representatives interviewed.⁷² A specific Department was set up by PT REA Kaltim to manage the PPMD scheme, including *sosialisasi* of the concept and identification of community lands available to implement it. The first PPMD schemes were carried out in Pulau Pinang and Long Belah Modang. The company provided these villages with managerial and technical support via an established cooperative, including the provision of oil palm seeds, fertilisers and pesticides, the costs of which were to be repaid by community members five years after planting, in the form of a percentage from the harvest reaped. According to the company representatives, local community members approached the company and offered up their land

to the scheme, upon which the company provided them with material and training support. The one-roof management plasma scheme began in 2008, at which point new applications for the PPMD scheme were no longer taken.

The early period thus saw a focus on the PPMD scheme rather than plasma, as PT REA Kaltim, holding the status of foreign investor (Penanaman Modal Asing – PMA), was not under legal obligation to implement plasma. Plasma was first implemented around 2008 in certain villages, following the release of Regulation No. 26/PERMENTAN/OT.140 / 2/2007 on Guidelines for the Licensing of Plantations by the Ministry of Agriculture.

Sosialisasi of plasma is reportedly ongoing since 2008 in all nine villages, with contracts signed on an individual basis with villagers and kept by the cooperatives. Loans with the bank are managed by the cooperative as well, and its members are chosen by the village itself. The company has also set up a Plasma Department with a Head of Plasma, all of whom are company staff. Company representatives acknowledged that only a limited amount of plasma had been realised to date, and stated that they were in the process of looking for land to open up the remaining areas of plasma. A contract for additional land is close to being finalised with neighbouring REA Holdings PLC concession PT KKS (Kartanegara Kumala Sakti), to be allocated to plasma for the local communities in PT REA Kaltim Plantations.

The main documents and notes of meetings between the company and communities are given to the village team who is responsible for providing these documents to community members should they request them. While meetings with community members only occur when a problem arises (rather than as a routine procedure), the company ensures that third party representatives are present as far as possible (this includes local NGOs such as Laskar, Komando and GMP). The company also strives as far as possible to

resolve problems through negotiation and dialogue, seeing legal proceedings as a last resort, as they know that the communities will be placed in a weak bargaining position and that a win-win outcome is not possible.

We opt for negotiation and mediation for conflict resolution. We want to resolve issues peacefully.
(Pak Murali)

While private security guards are hired by PT REA Kaltim Plantations to ensure the security of the concession and company personnel, and the mobile police brigade (BRIMOB) have entered the concession when protests and demonstrations by the communities took place, it was reported that they have never encountered serious problems in the field, and no serious conflicts have occurred with local communities. A conflict resolution mechanism has also been developed by the company and socialised to the village teams.

The company has carried out two Environmental Impact Assessments (EIAs; in 1995 and 2000) and one HCV assessment was carried out by consultant company Tropenbos. The conservation area within the concession is managed by a team of specialists in three divisions: Biodiversity Division, Ecosystem Services Division and Community Development Division. Local community members were reportedly compensated for land which is now located within the conservation area but there are still some areas within the conservation areas where land compensation has not yet been completed. The AMDAL of 1992 was socialised at the time, and a revised version of 13th June 2011 is now being used. The company also holds an Environmental Work Plan (*rencana kerja lingkungan* – RKL) and an Environmental Management Plan (*rencana pengelolaan lingkungan* – RPL) as part of the full AMDAL.

The company fully supports a dedicated conservation department (REA Kon) which consists of eight permanent members of staff, the majority of which have extensive experience of working for conservation

organisations. The REA Kon staff also work closely with many organisations including the Indonesian Institute of Sciences (LIPI), Universitas Mulawarman (UMUL) in Samarinda, Singapore Botanical Garden, international consultants and university researchers. Local communities are allowed to access the conservation areas for their daily needs (eg gathering non-wood forest products such as vegetables, fruit and fish) as well as engage in limited agriculture at the borders of the conservation areas, but are encouraged by the company to protect and conserve it as far as possible through *sosialisasi* and educational activities.

If the communities have interests in the conservation area, we are prepared to enclave parts of it for them, but till now we have not had any demands of the sort. In fact, the communities are not fully dependent on these areas, only very minimally, and no one was living in those areas before. (Pak Murali)

PT REA Kaltim Plantations has set up a Community Development programme, headed by a Community Development Manager, which is implemented and monitored by a team member permanently based in a number of villages (Muai, Long Mahli, Long Beleh Haloq, Long Beleh Modang, Pulau Pinang, Perdana, Kembang Jenggut, Kelekat and Bukit Layang). According to company representatives, the Community Development Programme is going very well and communities feel they can approach the team with their requests easily. Community development programmes include the provision of electricity (free in some villages) and clean water, the building of schools and clinics and generators.

Overall, PT REA Kaltim Plantations demonstrates a proactive stance towards accommodating and supporting the needs and demands of local communities, through a process of negotiation and dialogue, backed by concrete actions taken to this end.

Whatever their demands are, we will try to be of service to the communities. (Mbak Adriana)

The NGO consortium identified a number of unresolved compensation and plasma-related problems in the field, but nothing that could be justifiably termed 'conflict'. The efforts of the company to establish intermediary teams (eg village teams and plasma teams) at the village level as well as within the company organisation (eg Plasma Department, Community Development Programme) are indicative of an open and committed attitude towards fulfilling local communities' needs. PT REA Kaltim Plantations staff interviewed also demonstrated notable interest in understanding the perspectives of local communities as communicated to the NGO consortium with regards to their operations. They emphasised that support and advice from NGOs were desired as part of their efforts to improve their practices in the field.

We are ready to accept any criticisms to improve our future performance and strengthen our collaboration with other stakeholders. (Pak Murali)

Communities do not appear to be restricted in their access to land, including within the conservation areas, and no complaints were raised on this issue during community interviews. While plasma realisation and unpaid compensation remain outstanding issues, the company is aware of these demands and is working towards resolving them. Local communities in general support the presence of the company, and hope to gain the same benefits as the villages where plasma has been realised, such as Perdana and Pulau Pinang. Communication problems reported by certain community members appear to have more to do with lack of transmission of information internally by village representatives themselves (including village heads and village teams) to the community, rather than lack of effort on the part of the company to communicate with community-chosen representatives.

However, improvements to the process of respecting the right to FPIC are still needed. As noted earlier, the early stages of the company's interaction with local communities was more akin to negotiation

and compensation for lost land and rights, rather than a process seeking to obtain communities' consent. But even today, very few of the community members interviewed recall being involved in *sosialisasi*, either in the early years of the companies' operations or at later stages. The company representatives interviewed also found it difficult to explain what was meant by FPIC and how they were respecting this right in practice. They were also unable to clarify the difference between FPIC, *sosialisasi* and consultation, suggesting that FPIC as a right, and not a process, has not yet been fully acknowledged or scrutinised.

With regards to documentation, none of the community members interviewed had copies of documents such as AMDAL, the ESIA or the HCVA, or information on the HGUs obtained by the company. A major problem identified was the lack of participatory mapping of customary lands, a limitation recognised by both local communities and the company.

Different people lay claims to the same land, and this also causes inter and intra village conflicts. (Mbak Adriana)

Many problems would be resolved if we just had clear maps, with clear borders, that we were

involved in producing. (Pak Aslan, village head of Kembang Jenggut)

Some community members demand extravagant compensation for land which, it often turns out, is not theirs. In these cases, we feel like the victims. We feel like a tree that can be shaken to yield fruit (*pohon digoyang*). (Pak Murali)

Although this limitation was recognised by PT REA Kaltim Plantations representatives, and an indicator of Criterion 2.3 of the RSPO P&C refers to the mapping of recognised customary rights,⁷³ at the time of writing, the company did not appear to be planning to take measures to conduct participatory mapping, as they saw this as the responsibility of governmental bodies instead (but see endnote 37).

We do not want to take over the authority of the government. We can only facilitate a process of participatory mapping. (Mbak Adriana)

However, it is evident that the lack of clarity of customary land boundaries is a contributing factor to the unclear scope of individual and community rights to land, in

■ *RSPO Principles and Criteria posted outside Perdana Estate Division / Sophie Chao*



turn allowing for occasional opportunistic claims and duplicated compensation demands, particularly as the value of land increases.

In relation to plasma, the main problem identified is that while the company is working towards identifying land for this purpose, local communities are not being informed of this, and are therefore assuming that the company is not actively seeking to realise the plasma agreements in practice.⁷⁴ The procedural steps of the plasma scheme have apparently not been socialised to these communities, which, if done, would avoid a great deal of uncertainty and discontent on their part. And while conflict has not yet occurred to date, it can be anticipated that, if the company does not take measures to explain and inform communities on this issue, protests will multiply, with detrimental impacts on both the communities and the company's operations.

Finally, while PT REA Kaltim Plantations is visibly highly focused on conservation and the rehabilitation of formerly heavily

logged areas (and very successfully at that), company representatives interviewed (including environmental managers and staff), appeared less familiar with the concept of HCVs. Although the company has carried out an HCVA, HCV classifications are not used to demarcate conservation areas, which are instead called 'conservation areas' (*kawasan konservasi*). The company states that in its view, the concept of a High Conservation Value Area and a Conservation Area is the same – it is an area of natural habitat set-aside because it is considered to be of ecological, social or cultural value. The company is of the opinion that very few people understand what HCV 1, 2 or 3 mean so they have called these areas conservation areas because this is the terminology that both the company's general employees and local communities understand.

Local communities are allowed to plant fruit trees and carry out limited hunting, and no disputes with local communities over access to the conservation areas have been reported. According to company representatives interviewed, these conservation areas predate REA Holdings' membership of the RSPO, as do its conservation division, and as such they have not considered it necessary to set up HCV classifications in these areas

■ Meeting of NGO consortium and representatives of PT REA Kaltim Plantations at Perdana Estate / Carlo Nainggolan





for the reasons described above. It was also suggested that HCV classifications are more relevant to newly operating companies in order to ensure that conservation is taken into consideration in their practices and land use.

We did not set-aside conservation areas and start to manage these areas just to comply with the RSPO Principles and Criteria – it was something that we were already doing because we recognise that it is important. Communities have full access to the conservation zones. But what we do is provide education and training for them to promote sustainable use of these areas. (Sophie Persey)⁷⁵

Legal analysis

Legal irregularities identified in PT REA Kaltim Plantations' operations relate to the land acquisition process, the involvement of communities in the Environmental Impact Assessment, and the implementation of plasma.

With regards to the land acquisition process, according to Article 4 paragraph (4) Government Regulation No. 40 of 1996:⁷⁶

in the event that the land applied for leasehold has plants and/or buildings owned by other parties whose existence is based on legitimate rights, the owners of those buildings and plants shall be given compensation which shall be charged to the new leasehold holder.

Article 1 point 1 of the Decree of the State Minister for Agrarian Affairs/the Head of National Land Agency No. 21 of 1994, states that:⁷⁷

■ (left) Community members in the PPMD scheme receive seedlings, fertiliser and pesticides from PT REA Kaltim Plantations, to whom they sell their Fresh Fruit Bunches / Sophie Chao

■ (right) Between 20 and 35% of the PT REA Kaltim Plantations concession are demarcated as conservation areas / Sophie Chao

Acquisition of land is any activity intended to obtain land through transferring of rights over land or through transferring or relinquishment of rights over land for which compensation shall be given to the entitled.

This regulation distinguishes between two statuses of land ownership, namely State land obtained through transfer of rights, and entitled land obtained through transfer or relinquishment of rights with compensation. The procedures for land acquisition by the private sector under Article 2 of Decree of the State Minister for Agrarian Affairs/the Head of National Land Agency No. 21 of 1994⁷⁸ specify that:

Land acquisition shall be conducted *directly between companies and land owners or land right holders upon agreement.* (emphasis added)

Furthermore, in accordance with the provisions of Article 8 paragraph (1) of the Decree of the State Minister for Agrarian Affairs/Head of National Land Agency No. 2 of 2009:⁷⁹

The permit holder is allowed to relinquish rights and interests of other parties from the concession *based on agreements with the right holders or the interested parties through purchase, compensation, land consolidation or other means*

CUC audit of PT REA Kaltim Plantations

The RSPO certification audit of PT REA Kaltim Plantations was conducted on 28th February – 4th March 2011 by Control Union Certifications. While the NGO consortium relied on it to some degree in carrying out its observation in the field, information available from the audit was limited as '[t]he full and complete checklist contains some confidential information and is an extensive document used by the certification decision panel and certifier'. The version publicly available demonstrates a number of limitations which are worth noting.

First, important statistics, such as the total area of the concession, the total area of HGUs obtained by the company, the total area of PPMD and the number of villages within the concession, are absent. Maps provided are largely illegible, making identification of villages, plasma, PPMD and conservation areas near impossible. It was evident from field findings that not all villages had been identified in the audit, or visited, as part of the audit. The audit states that the eight RSPO Principles were only considered for one estate as it was deemed 'not [then] necessary to consider them all again for each estate as many policies and SOPs were found to be applicable to all estates and to both mills'. The reliance on company documentation and examples from one estate out of six suggests that data obtained directly from the field with regards to the efficiency of the implementation in practice of company policies is lacking. Finally, one of the three identified non-conformances refers to Criterion 1.3.6, which is somewhat confusing, as there are only two Criteria (1.1 and 1.2) under Principle 1 of the RSPO P&C on Commitment to Transparency.

The 'Summary of the findings by criteria' section in particular is vague and lacking in

detailed examples and evidence for identified compliance. In many cases, the link between the Finding and the Summary evidence/ additional comments is ambiguous. An example of this is Criterion 2.2 ('The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights'). For this criterion, one of the Findings is that 'Land acquisition has been with free, prior and informed consent'. However, the evidence provided for this refers only to the HGU land titles obtained by the company, and the land titles and legal documents of the Cakra and Perdana mills. It is very unclear how these documents prove that an FPIC process has been carried out.

Another example is Criterion 2.3 ('Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent'), where the Finding is that 'customary rights were identified at the time of plantation development and a negotiation procedure took place for compensation'. It is highly questionable whether negotiation over compensation can be equated with the respect of local communities' right to free, prior and informed consent. Rather than describing the process of consent-seeking, the evidence provided for this Finding is limited to a brief description of documents produced in the negotiation process, suggesting that the stage of seeking consent was directly replaced with negotiation over the terms of the pre-assumed relation between the company and the community. Overall, the right to Free, Prior and Informed Consent appears to have been treated dismissively, in line with the general lack of focus on the social dimension of the company's operations and their impact on local communities.

in accordance with the existing regulations.
(emphasis added)

In the case of PT REA Kaltim Plantations, *sosialisasi*, acquisition of land and compensation payment has frequently been implemented not primarily or directly with the rights holders and land owners but through governmental structures such as government officials at provincial, district, sub-district and village level. According to community members, these processes tended to involve village heads and formal representatives rather than community members themselves, as the rights holders to the customary land. A similar situation was reported in the identification of land owners, whereby the company relied on village officials to obtain information on who owned which parts of land, rather than approaching community members directly. Furthermore, documentation related to compensation, negotiations and agreements over land transfers have tended to be conveyed to village heads and the established teams, but not to the wider community. While it is expected that these representatives will inform the wider community, findings from the field suggest that a large number of community members remain unaware and uncertain as to compensation procedures and the outcomes of meetings between village representatives and the company.

The local government of East Kalimantan has set up a committee of nine members, known as the Land Acquisition Committee or Team 9, in line with Article 14 paragraph (3) of the Decree of the Head of National Land Agency of the Republic of Indonesia No.3 of 2007⁸⁰, which is responsible for:

- a. providing explanations or dissemination to the villagers;
- b. conducting research on and inventories of parcels of land, buildings, plants and other objects related to land whose rights are going to be relinquished or transferred;
- c. conducting research on the legality of parcels of land whose rights are going to be relinquished or transferred and on the supporting documents;

- d. announcing the results of the researches and inventories referred to in b and c;
- e. holding discussions with land owners and government agencies that need land in order to determine forms and/or amount of compensation;
- f. determining amount of compensation for land whose rights shall be relinquished or transferred;
- g. witnessing the distribution of compensation to land owners;
- h. making official reports on relinquishment or transfer of rights;
- i. administering and documenting all land acquisition-related files and submitting them to government agencies needing land and the District/City Land Office; and
- j. reporting problems and providing opinions on land acquisition settlement to the Regent/Mayor or the Governor for Greater Jakarta Special Capital Region if consensus cannot be reached for decision making.

According to community members, both the government and village land acquisition teams, which have always been directly involved in the dissemination and negotiation process between the company and the communities, have frequently failed to convey relevant information (particularly regarding compensation) to the wider community, and customary landowners report not having been given the freedom to take their own decision regarding whether and/or how their lands would be used by the company.

The land acquisition team acts as the liaison and intermediary between the land owners and the company and this appears to be in contradiction to the provision set forth in Article 2 paragraph (2) of the Decree of the State Minister for Agrarian Affairs/ the Head of National Land Agency No. 21 of 1994 on Land Acquisition Procedures for Companies in the Context of Capital Investment which states that:

Land acquisition shall be conducted directly between companies and land owners or right holders of land upon agreement. (emphasis added)

Furthermore, Article 1338 paragraph (1) of the Indonesian Civil Code states that:

All legally-concluded contracts shall apply as acts *to those who have concluded them*. (emphasis added)

When further analysed, the provisions of this article also provide freedom for the involved parties to:⁸¹

1. make or not to make an agreement;
2. enter into an agreement with anyone;
3. determine the agreement's content, implementation, and requirements;
4. determine the agreement's form, written or oral.

The provision of Article 1320 paragraph (1) of the Indonesian Civil Code⁸² states that one of the requirements for the validity of consent is:

There must be consent of the individuals who bind themselves.

Information-sharing via village authorities and the established teams do not imply that communities were given the option to give their free, prior and informed consent to the company's investment plans on their customary lands, particularly when the content of *sosialisasi* appears to be informing the communities of the company's plans rather than seeking their consent.

With regards to the Environmental Impact Assessment (AMDAL), Article 22 paragraph (1) of Law of the Republic of Indonesia No. 32 of 2009 on Environmental Protection and Management⁸³ states:

Every business and/or activity plan having substantial impacts on the environment shall be obliged to have an EIA document.

Article 26 paragraph (2) further specifies that:⁸⁴

The involvement of communities shall be based on the principle of provision of transparent and complete information prior to the execution of the activity. (emphasis added)

The purpose of this provision is to ensure that communities know, understand and are aware of potential impacts on their environment arising from the company's operations. While PT REA Kaltim claims to have conducted dissemination and consultations with the villagers with regards to the preparation of the company's EIA document, this was contradicted by the statements of most community members interviewed, including the village heads of Kembang Jenggut Village and Perdana Village, who stated that they had never seen PT REA Kaltim's EIA document. Community members interviewed report not knowing exactly what the team's activities were, that dissemination and consultation activities were (and continue to be) conducted primarily at the district and provincial towns, located away from the villages. It should be noted however that the company's AMDAL, issued in December 1998 (14 years ago), involved other village representatives than those present in the villages today.

Finally, with regards to plasma, company representatives interviewed stated that the company, as a foreign entity, was not under the obligation to provide plasma prior to 2007 when the Decree of the Minister of Agriculture No.26/PERMENTAN/OT.140/2/2007 was passed (ie non-retroactive legislation). However, Article 1 paragraph 6 of the Government Regulation No. 44 of 1997 states:⁸⁵

What is meant by the partnership system is forms of partnership regulated in Law No. 5 of 1995 on Small-Scale Business.

This is further elaborated in Section 3 which states:⁸⁶

In the nucleus-plasma system, large- and medium-scale businesses as the nucleus shall build and develop small-scale businesses which constitute their plasma with regard to:

- a. Provision and preparation of land;
- b. Provision of production facilities;
- c. Provision of technical guidance to business management and production;

- d. Acquisition, control and improvement of technology required;
- e. Financing, and
- f. Provision of other forms of assistance required for increased business efficiency and productivity

Similar partnerships in oil palm plantations have already been implemented since the late 1970s, for example, the Nucleus Estate and Smallholder Scheme (NES) program (1978 to 2001) the Prime Cooperative Credit for Members (KKPA) program which replaced the NES program (1995), and the One-Roof Management system through the Decree of the Minister of Agriculture No. 33/Permentan/OT.140.7/2006 on Plantation Development through Plantation Revitalisation Programme. The above regulations and precedents for plasma scheme implementation prior to 2007 show that the development of partnerships with local communities in the form of plasma is not solely stipulated by Article 11 of Decree of the Minister of Agriculture No. 26/PERMENTAN/OT.140/2/2007 on Guidelines to Plantation Business Licensing, and, on that basis, that communities therefore have the legitimate right to request plasma.

Limitations to the realisation of FPIC and tenure security

Representation and division

The politics of *divide and rule*, or *divide et impera*, were commonly practiced by the Dutch colonial powers in Indonesia as a means of segregating ethnic groups and disrupting power relations among Indonesian elites, such as in the former sultanates and kingdoms. A particularly vivid example of this strategy and its destructive impacts was seen during the era of Enforcement Planting (*Cultuur Stelsel*), which saw the tearing apart of rural communities in Java and the disruption of their social ties and social organisation. Under *Cultuur Stelsel*, villages in Java were exploited to provide cheap land and abundant cheap labour⁸⁷ based on

Agrarischewet (1870) which stipulated that uncultivated lands or lands whose ownership could not be proven belonged to the State.

A similar phenomenon of dividing communities to access their lands was employed by a timber company (PT Limbang Ganesa) formerly operating in Kembang Janggut, according to local communities. PT REA Kaltim itself obtained a license to open its concession in the area on the grounds that it was State land, and that customary rights to land and natural resources were not recognised under national and provincial laws. Local communities, cornered into a 'no choice' position, found themselves with little option but to work with the company, either through the earlier PPMD scheme or the later plasma scheme.

One contributing factor to this situation has been the way in which the company has sought the consent of community members by approaching them on an individual basis, rather than a collective, community-wide basis. In the words of Njang, a community member of Pulau Pinang, 'individuals were pressed by the situation and had to think of themselves over others in the absence of alternative ways to generate incomes except by joining the oil palm company.'

It was also reported that the pursuit of consent on an individual basis had weakened social ties among and within villages. At present, the communities appear divided rather than united, although a notable trend of 'joining forces in protest' is visible, as one village's expression of discontent triggers similar demonstrations in other villages. At the same time, a certain degree of resentment was evident among communities who had been less favoured by the company in terms of social development and economic opportunities, such as plasma.

The politics of separation, and the inherent problem of who represents communities, is visible in the fact that individual agreements tend to override village-wide consultations

and discussions over issues such as plasma and land boundary demarcation. The term 'community', in the view of the company, thus appears to mean the sum of individuals who have made individual agreements with companies, rather than a group of people who have been consulted collectively on issues that are bound to have a collective impact, at least in terms of intra- and inter-community social and tenure relations. The issue of how individuals and communities are represented in an accountable and legitimate manner is at the heart of this question, as attested by several complaints over the legitimacy and transparency of current village heads. It can be argued that a village community, in the context of FPIC as a collective right, should be viewed as a single subject, an 'artificial man' or a socio-political unit, just as a company is an entity, i.e. a legal entity and person. A community is not merely the sum of its individuals but a separate unit that is more than the sum of its members, with its own identity and its own socio-cultural system. In this matter, the State has a very important role to play in affirming the status of communities as legal entities, not only in the context of governmental administration but also as a socio-cultural unit, with its collective rights, including that of FPIC.

While the steps taken by the company to allow local communities to benefit from their presence (such as in the form of plasma agreements, PPMD and social development initiatives) are laudable, and appreciated by the communities to the extent that they have been realised so far, findings from the field also suggest that the interaction between the company and the communities, since the 1990s, has been limited to consultation and negotiation over the terms of their relation, rather than respect for the right of local communities as stakeholders to give or withhold their consent. It is difficult, therefore, to assess the positive achievements of the company in the light of the lack of proper FPIC in the first place. However, given that respect for the right to FPIC is an iterative (and not a one-off) process, an examination of the development of the interaction between the company and

local communities is also relevant to the discussion over the obstacles still faced by the latter in terms of securing their land.

One of the main obstacles identified is the lack of information made available to local communities by the company via the different organisms established so far to this end. While information may be conveyed to the various teams, and to the village heads, it is clear that very little is then being conveyed to the wider community. Information on the RSPO, on the right to FPIC, on the legal status of the company's operations and permits, and on the details of the plasma scheme (for those who are still waiting for its realisation) are lacking, and this is probably the most significant reason for which problems and tensions still exist among and within communities.

A second obstacle has been the persistent lack of participatory mapping of customary lands since the 1990s, by either the company or the government. The lack of clear boundaries is also leading to occasional opportunism and false claims on the part of certain community members. Both they and the company admitted that many problems could be avoided by mapping customary lands jointly with the local communities, but the company has so far not planned to carry this out, assuming that this is the responsibility of the government and not their own. Interviews with government representatives on the other hand suggest that the participation of community members in mapping is not seen as relevant or important. The lack of understanding and recognition of FPIC by government representatives interviewed, and its frequent equation with *sosialisasi* (understood as the sharing of *a priori* decisions and intentions by the State and the company to the community as a one-way rather than two-way dialogue) further hinder the realisation of this right by the communities concerned.

A third limitation has been the uneven treatment of and opportunities given to local communities in the nine villages

within the concession. While it was not possible to ascertain whether this was causing inter-village conflict or tensions due to the sensitivity of the issue and the short period of time spent in the field, it can be argued that this may lead to such an outcome in the longer term, if villages receiving less opportunities fail to see their demands realised in the near future.

Finally, while the conservation practices of the company have to date not posed a problem to the local communities, the demarcation of the HCV categories identified in the HCVA on the ground could possibly help better reflect and cover the range of conservation priorities (and related social and/or economic values) shared by stakeholder groups and help maintain and/or enhance these values. The social dimension of HCVs (ie their importance to local communities) could be better reflected by a clearer demarcation of HCV 4 (areas that provide basic ecosystem services in critical situations), HCV 5 (areas fundamental to meeting basic needs of local communities) and HCV 6 (areas critical to local communities' traditional cultural identity).

Recommendations

Recommendations from the communities

The main recommendations expressed by the communities were as follow:

- Realisation of plasma scheme for communities who hold MoUs with PT REA Kaltim Plantations within a clear and well-defined time frame.
- Equal treatment of all villages within the concession in terms of plasma opportunities, compensation payment and community development initiatives.
- Compensation for land lost in the early 1990s, including compensation of crops planted at the time, and in some cases, the cumulative value of the land and crops since the time of acquisition by the company.
- Improved channels of communication for information-sharing by the company

and communities, to be activated on a routinely basis and not only when problems arise.

- Legal training for communities on their rights under national and international laws.
- Training facilitated by the company on the RSPO standards and on the right to FPIC.
- Greater transparency on the part of the company with regards to the legal status of its current and projected operations and expansion.
- Participatory mapping of customary lands and concession/HGU boundaries in order to clarify who is entitled to compensation for lost land.
- Improvement in the flow of information such that it is not solely restricted to the village heads and various teams but also conveyed to community members in an adequate, sufficient and timely manner.
- Provision of relevant documents to community members, particularly in relation to mapping, HGUs, Social and Environmental Impact Assessments, and the AMDAL.
- Development of a regional bylaw recognising and protecting customary rights to land.
- Action on the part of the regional parliament (*Dewan Perwakilan Rakyat Daerah* - DPRD) to resolve ongoing land disputes within the community, in collaboration with other relevant government bodies and the company.

Recommendations from the company

The main recommendations expressed by the company were as follow:

- The regional government (*Pemerintah Daerah* - Pemda) to act as a bridge and third party facilitator for local communities and PT REA Kaltim Plantations in information dissemination, mapping and conflict resolution, based on the principle of transparency.
- Pemda to act as a third party arbitrator for local communities and PT REA Kaltim

Plantations in resolving land compensation and plasma dispute resolution, based on the principle of transparency.

- NGOs to collaborate with PT REA Kaltim Plantations and local communities to facilitate two-way communication and information sharing.
- Greater transparency on the part of the government with regards to emerging policies, laws and regulations, in particular in relation to development and natural resource exploitation.
- Closer collaboration with government bodies, from the village level to the provincial level, to impart information to local communities regarding their legal and human rights, as well as with regards to the implementation of plasma.
- Further efforts on the part of village heads to convey information obtained in their interactions with the company to the wider community, in order to avoid misunderstandings and tensions within communities.

Recommendations from State agencies

One recommendation made by interviewed government representatives from the National Land Agency was the development of regulations at the district level in Kukar in relation to conflict resolution outside of the formal court system. A draft decree on Settling Land Disputes Outside the Court for Kukar (*Rancangan Peraturan Bupati Kukar Tentang Penyelesaian Sengketa Lahan Diluar Peradilan*) was being developed at the time of writing.

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4. Badan Pusat Statistik 2011.
5. Brookfield *et al.* 1995:172; Hoffmann *et al.* 1999.
6. Persoon & Osseweijer 2008: 81.
7. BAPPEDA 2012.
8. Manning 1971: 56.
9. Magenda 1991.
10. Supomo 1995.
11. Brookfield *et al.* 1995: 211-214.
12. Black 1985.
13. Kerajaan Nusantara.com (nd)
14. Bupati Kutai 2000. Note: The decision to divide Kutai into three regions followed the release of Indonesia's regional autonomy laws – Laws No. 22 and 25/1999 – which aimed to provide an opportunity for further autonomy and to facilitate administration of this large region.
15. Oosternan & Wanabakti 1999: 5.
16. Ju Lan & Gastardo-Conaco 2004: 27 – 46.
17. Ibid.
18. Sawit Watch & Walhi Kaltim 2012.
19. Brookfield *et al.* 1995.
20. REA Holdings PLC (nd)a.
21. Interview with PT REA Kaltim Plantations representatives, Perdana Estate Main Division Office, 11th July 2012; Interview with Kukar National Land Agency and the Forestry and Plantations Office, 11th July 2012.
22. Interview with PT REA Management, 11th July 2012.
23. REA Holdings PLC 2011: 5.
24. Ibid.
25. Interview with PT REA Management, 11th July 2012.
26. A third palm oil mill was under construction at the time of writing.
27. REA Holdings PLC 2011: 10. Note: 900 ha of plasma have been planted in Pulau Pinang. Data on plasma in other villages was not available.
28. REA Holdings PLC 2011: 32.
29. When PT REA Kaltim Plantations was first established in 1992-1993, there were eight villages within the concession, some of which were then further sub-divided into new villages, such as the villages of Pulau Pinang and Long Belah Haloq.

30. The company states that Hambau does not have any land within the REA Kaltim HGU. In the past there was a dispute between Kembang Janggut and Hambau because both villages claimed the same area of land within the REA Kaltim Berkas Estate. The Camat was called to settle this dispute and he ruled that Hambau did not have any village land within the Berkas estate area.
31. Perdana also includes Ketano within its administrative borders, as Ketano has no village head.
32. Kenohon also includes Modang within its administrative borders, as Modang has no village head. Kembang Jenggut, Hambau, Kelekat, Bukit Layang, Muai, Perdana, Pulau Pinang, Long Belah Haloq and Kenohon are in Kembang Jenggut sub-district. A further two villages in Kembang Jenggut sub-district are not within the concession but sell their oil palm fruit to PT REA Kaltim (Luasako and Genting Tanah).
33. The company states that Gunung Sari, Ritan Baru and Beluksen own land within one of REA Holdings' subsidiaries, PT SYB but not in PT REA Kaltim Plantations.
34. Ritan Baru includes Tukung Ritan village.
35. The company states that Muara Ritan owns land within PT PU but not PT REA Kaltim Plantations.
36. Gunung Sari, Long Lalung, Ritan Baru, Muara Ritan and Beluksen are in Tabang sub-district.
37. According to the company, a survey team (Muspika) is currently in the process of trying to produce an accurate village boundary map.
38. REA Holdings PLC (nd)b.
39. It was not possible to identify the villages within the concession from the maps provided in the CUC audit as they are largely illegible.
40. Control Union Certifications 2011: 8.
41. Ibid.: 18.
42. Criterion 4.7 An occupational health and safety plan is documented, effectively communicated and implemented.
43. Criterion 2.3 There are open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties.
44. It is unclear what 1.3.6 refers to, as there are only 2 criteria (1.1 and 1.2) under Principle 1 of the RSPO P&C on Commitment to Transparency (including in the Indonesian National Interpretation of the P&C).
45. It should be noted here that while community members of Hambau claim some of their lands lie within the PT REA Kaltim Plantations concession, the company states the village has no land within their HGU.
46. This confirms the non-conformity raised in the RSPO audit of PT REA Kaltim Plantations and recommendation that '[T]he company must review the lines of communication and put into place clear systems to ensure communities' aspirations and concerns reach the appropriate level of management and [are] dealt with accordingly.' Company representatives stated that the Community Development Department (ComDev), already established at the time of the audit, was playing a key role in this respect, but it was not clear from the company's response how they had sought to remedy the non-conformity since the audit in March 2011.
47. Interview with PT REA Kaltim Plantations representatives, Perdana Estate Main Division Office, 11th July 2012.
48. See Glossary for an explanation of the term *sosialisasi*.
49. *Sosialisasi* was carried out somewhat later, in 1998, for the villages located in Damai estate.
50. Interview with village head of Perdana (Pak Kasmani), head representative of BPD (Pak Pitoyo), member of BPD (Syainuddin), Head of Management of Village Government of Perdana (Pak Joni) and village government member (Pak Ali Syafaat), 9th July 2012.
51. At the time, Perdana was a hamlet (*dusun*) of Long Belah Haloq and became a village (*desa*) in 2008.
52. A number of community members were confused by this figure, as the total area of Perdana is only 3,678 ha (inclusive of residential areas and homesteads), and thus they are not clear where the extra land is located.
53. Interview in Hambau, 7th July 2012. A small portion of Hambau is located within the PT REA Kaltim Plantations concession, while the majority of its land is located within the 4,000 ha concession of Malaysian oil palm company PT TPS (Tunas Prima Sejahtera), which began operating in 2008 and today employs a large number of community members (reportedly around 80%).
54. This information was confirmed by the village head of Kembang Jenggut.
55. Pak Ridwan is Secretary of the PAN (Partai Amanat Nasional) in Hambau village and staff of PT Tunas Prima Sejahtera (a subsidiary of Malaysian company Asia Pacific Land Berhad) with professional links with the Regional Parliament (*Dewan Perwakilan Rakyat Daerah - DPRD*) of Tenggarong.
56. RT, or *Rukun Tetangga*, is a village level classification of households.
57. Interview with RT1 head Philipus Njang, Pulau Pinang, 11th July 2012.
58. Interview with community members Pak Wahidu, Ibu Epi and Pak Muhammad Lukam, Muai, 9th July 2012.
59. Interview with village head of Kembang Jenggut (Pak Aslan), 8th July 2012. The village head of Kembang Jenggut stated that around 5,000 ha of land in Kembang Jenggut was part of the PT REA Kaltim concession, in accordance with a decision of the village team in 2006 – 2007.
60. Pak Aslan became village head on 4th April

2008. He is a member of the Golkar political party and supported the political campaign of the election of the former District Head (*bupati*) of Kutai Kartanegara.
61. The company confirmed that no participatory maps of customary lands had yet been produced, by them or by government bodies.
 62. One of the problems faced by Muai in terms of representation and communication with PT REA is that their village head does not live in Muai itself but in Hambau. According to community members interviewed, the village head rarely visits Muai and is not aware of the problems faced by the community, so many choose instead to go to the Village Secretary, or straight to the sub-district, with their complaints.
 63. The village head of Perdana, for example, reported that the company had provided funds for the building of a mosque (50 million rupiah) and for educational facilities (12.5 million rupiah). Community members themselves acknowledged that Perdana had received more benefits from the company than any other village, in terms of compensation, employment opportunities and social development ('we are the golden child of PT REA' – Pak Pitoyo). Further information on community development initiatives are available in the company's Community Development Report, but the NGO consortium were unable to access this document.
 64. In Hambau, a community member found out about the RSPO through interviews with the NGO consortium and sought the team the next day with a printed copy of the P&C, which he read out loud, and asked to be explained to him, so he could share the information with the rest of his community.
 65. According to contacts in Hambau, the community of Muai was protesting because PT REA Kaltim Plantations' concession was stretching 'right up to our backyards'.
 66. A case of water pollution due to mill effluents in 2004 was confirmed by company representatives and the PT REA Kaltim Plantations auditors. The company however affirms that conflicts were over land and compensation and not over water pollution.
 67. The location of the protest was referred to by community members as 'kilometer enam' (kilometer 6).
 68. National Land Agency representatives stated they were not aware of more recent conflicts as PT REA Kaltim Plantations had not yet submitted its second semester report.
 69. Koran Kaltim 2012.
 70. Interview with Pak Sandi, HGU and administrative staff, and Pak Hardiono, mapping and land use staff, National Land Agency Office, Tenggarong, 11th July 2012. NOTE: Further government body representatives were not available for interview due to the occurrence of a large flood in Samboja.
 71. Interview with PT REA Kaltim Plantations representatives, Perdana Estate Main Division Office, 11th July 2012.
 72. A discrepancy in dates was identified with the CUC audit, which states that PPMD was first implemented in 2002 and closed to new members in 2008 when PLASMA was introduced.
 73. Criterion 2.3 Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent.
Indicators: Maps of an appropriate scale showing extent of recognised customary rights (Criteria 2.3, 7.5 and 7.6) [...] Guidance: [...] Where customary rights areas are unclear these are best established through participatory mapping exercises involving affected and neighbouring communities.
 74. With regards to plasma, representatives of the Kutai Kartanegara Forestry and Plantations Office also recognised that there were still ongoing problems in Kembang Janggut, and that these resulted from miscommunication between the community and the company ('The community protested in June 2012 because the company failed to inform the community that they were still looking for land for the plasma scheme. Because the communities do not know this, they protest.' - Pak Marli.)
 75. Interview with Sophie Persey, REA Holdings PLC Sustainability Manager, London. 6th August 2012.
 76. Government Regulation No.40 of 1996 on Business Use Permit (*Hak Guna Usaha*), Building Use Permit (*Hak Guna Bangunan*) and Land Use Permit (*Hak Pakai Atas Tanah*), Article 4 paragraph (4).
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 79. Decree of the State Minister for Agrarian Affairs/the Head of National Land Agency No. 2 of 2009 on Location Permit, Article, Article 8.
 80. Decree of the Head of National Land Agency No. 3 of 2007 dated 21 May 2007 on Provisions on Land Acquisition for Development for Public Interests, amended from President's Decree No. 36 of 2005 on Provision of Land Acquisition for Development for Public Interests, Article 14 paragraph (3), dated 21 May 2007.
 81. Yahya Harahap 1996: 29.
 82. Kitab Undang-Undang Hukum Perdata (*Burgerlijk Wetboek voor Indonesie*), Staatsblad Tahun 1847, Nomor 23.

83. Law of the Republic of Indonesia No. 32 of 2009 on Environmental Protection and Management, Article 22 paragraph (1).
84. Law of the Republic of Indonesia No. 32 of 2009 on Environmental Protection and Management, Article 26 paragraph (2).
85. Government Regulation No. 44 of 1997 on Partnership, Article 1 number 6.
86. Government Regulation No. 44 of 1997 on Partnership, Article 3.
87. Wolf 1990: 334 cited in Mulyanto 2012: 31.

PT Bangun Nusa Mandiri and the Dayak Jelai and Dayak Kendawangan peoples of Ketapang district, West Kalimantan

6

Norman Jiwan, Andiko Sutan Mancayo, Antonius Priyani Widjaya,
Tawangatri Kusumohartono and Nikodemus Ale



This case study was carried out in the concession of PT Bangun Nusa Mandiri (PT BNM) in the Tumbang Titi, Marau, Manis Mata and Air Upas sub-districts of Ketapang district, West Kalimantan. The purpose of the study was to investigate from a grassroots level how FPIC is being respected, to compare these findings with the obligations of PT BNM and its mother holding company, GAR/SMART, as members of the RSPO, and to bring to light the processes and power dynamics at play between affected local communities and indigenous peoples, local civil society networks and the company in question. Ketapang district

Ketapang district

Under Dutch rule, Ketapang district was one of the districts (*Afdeling*) of the West Kalimantan Residency (*Residentis Western Afdeling Van Borneo*) whose capital was located in Pontianak. Ketapang district was

■ Research team in Ketapang / Andiko Sutan Mancayo

itself divided into three sub-districts (*Onder Afdeling*): *Onder Afdeling* Sukadana in Sukadana, *Onder Afdeling* Matan Hilir in Ketapang and *Onder Afdeling* Matan Hulu in Nanga Tayap. Each *Onder Afdeling* was governed by a *Wedana*, or district chief. Later, these *Onder Afdeling* were subdivided into several *Onder Distrik*, with each *Onder Distrik* governed by a Deputy *Wedana*.⁶ Ketapang district remained under *Afdeling* status after the end of Dutch colonial rule and the arrival of the Japanese in 1942. Its status was later revised pursuant to Stard Blood No.58 of 1948 which recognised the existence of *swapraja* governance – self-ruling territories or regencies. Ketapang was divided into the three *swapraja* regions of Sukadana, Simpang and Matan, which were then incorporated into a federation. Under the governance of the Republic of Indonesia, by virtue of Law No. 25 of 1956, Ketapang district was granted status

as part of the autonomous region of West Kalimantan Province, under the leadership of a *bupati*, or regent.

Geographic location

Ketapang district lies to the south of West Kalimantan Province (south latitude 00 19' 00" to 30 05' 00", east longitude 1080 42' 00" to 1110 16' 00"). It is adjacent to Kubu Raya and Sanggau districts to the north, the Java Sea to the south, Central Kalimantan Province and Sintang district to the east and the Natuna Sea to the west. Ketapang district is the largest district in West Kalimantan with an area of 35,809 km², of which land represents 92.74% or 33,209 km². Kendawangan has the largest area (5,859 km² or 16.36%) among the sub-districts of Ketapang while Delta Pawan is the smallest district (74 km² or 0.21%). In terms of relief, Ketapang's coastal area runs from north to south and is composed mainly of land and swamps⁷ whereas its upstream areas are hilly and partially covered by dense forest.⁸ Similar to other regions in West Kalimantan and Kalimantan more generally, large rivers flow through Ketapang district, the longest being Pawan River, which connects Ketapang city in Delta Pawan District with Matan Hilir Utara, Muara Pawan, Sandai, Nanga Tayap and Sungai Laur districts. This river is an artery that bridges the economic activities of the rural population with those in the sub-district and district capitals.

Population

In 2006, there were 486,792 individuals residing in Ketapang with a population density of just 14 per km², unevenly spread out across the district. The population grew by 2.58% from 1980 to 1990 and 2.2% from 2000 to 2006, with the highest rates of growth reported in Sungai Laur and Sukadana, partly as a result of the development of the palm oil industry. The population of Ketapang is relatively young, with 32.56% of the total population under 15 years of age and only 3.27% over 65.⁹



■ Map of Ketapang district

Oil palm development policy in Ketapang district

Ketapang district covers almost 21% of the province's 14.6 million ha of landmass and oil palm plantation development is part of both the local and central governments' strategic economic and rural development policies. The palm oil sector in Ketapang district is an important part of the 'special economic corridors' under the National Economic Development Acceleration Master Plan, otherwise known as MP3EI (*Master Plan Percepatan dan Perluasan Pembangunan Ekonomi Indonesia*).¹⁰ Around 1.4 million ha of Ketapang's forests have been slated by the authorities for further oil palm expansion. PT BNM is one of the projects listed as an economic corridor (oil palm plantation and edible oil industry) in Kalimantan under the MP3EI Master Plan with a total investment value of Rp. 154 billion (USD 15,873,015).

Until recently, Ketapang district was still rich in natural forest resources, including timber, but as these resources declined sharply, due to massive and unsustainable logging operations to satisfy domestic and international timber trades and markets, local authorities shifted their agenda towards rural development, poverty alleviation schemes and employment generation. Instead of reforesting logged-

over forestland areas, district and provincial authorities chose to reallocate and convert these areas to agricultural business activities, particularly oil palm plantations. Reforestation of heavily degraded forest was considered less lucrative due to the long investment return periods, as production was achievable only after 10 to 15 years of planting. Palm trees, on the other hand, bear fruit after only four years of planting and can be harvested twice a month, making them an economically attractive crop. Ketapang district could also provide cheap labour, low operational costs and large agricultural lands for this development to take place.

More recently, European market demand for palm oil as a biodiesel, as part of the European Union's mandatory biofuel target for renewable energy (EU-RED) has opened up new market opportunities for palm oil. Both Malaysia and Indonesia have jointly announced that 40% of their domestic palm oil production is allocated to meet the European market demands for biodiesel. Prior to this boom in demand for biodiesels, it is reported that only 3% or 100,000 ha of Ketapang district was covered with oil palm plantations. However, by late 2005, the Ketapang district government had slated 742,000 ha for oil palm, increased to 900,000 ha in 2006 and 1.4 million ha the following year. Thus over the course of three years, Ketapang district has seen a massive 40% of its land area allocated to oil palm plantations by the district government.¹¹

According to a study by Carlson et al, 49% of Ketapang's oil palm plantations were established on forest land from 1989 to 2008. Intact forests constituted the majority of this conversion (21%), followed by secondary (21%) and logged (7%) forests. 37% of oil palm plantations replaced agro-forests and agricultural fallows. Only 14% of oil palm was sourced from burned/cleared and bare lands. From 1994 to 2001, 81% of plantations were converted from forests on mineral soils. Conversely, from 2001 to 2008, agro-forests and non-

forest land was cleared at the highest rate (72%). Throughout 2007, 73% of oil palm expansion occurred on mineral soils with 27% on peatlands and since 2008, forested peatland has been the main area of conversion (44%, 54% of converted land in 2007–2008 and 69% in 2008–2011). By 2011, oil palm had been planted over 51% of mineral soils and 49% of peatland.¹²

District policies and regulations on plantation development

The relevant policies and regulations applicable in Ketapang district in relation to oil palm development are listed below:

1. Law No.27 of 1959 on the Emergency Law No. 3 of 1953 on the Establishment of Level Region II in Kalimantan;
2. Law No.5 of 1960 on Basic Agrarian Law;
3. Law No.8 of 1981 on Criminal Procedure Code;
4. Law No.5 of 1990 on the Conservation of Biological Diversity of Natural Resources and Its Ecosystems;
5. Law No.5 of 1984 on Industries;
6. Law No.12 of 1992 on Crops Cultivation System;
7. Law No. 25 of 1992 on Cooperatives;
8. Law No.23 of 1997 on Environmental Management;
9. Law No.18 of 2004 on Plantations;
10. Law No.25 of 2007 on Capital Investments;
11. Law No. 26 of 2007 on Spatial Planning;
12. Government Regulation No.44 of 1997 on Partnerships;
13. Government Regulation No.27 of 1999 on Environmental Impact Assessment;
14. Government Regulation No.82 of 2001 on the Management of Water Quality and Water Pollution Control;
15. Government Regulation No.79 of 2005 on Guideline on the Development and Supervision of Governance of District Government;
16. Presidential Decree No.99 of 1998

#	RSPO member with presence in Ketapang	RSPO member since	National origin and joint venture partners	Number of subsidiaries	Gross land bank
1	Asiatic Development	Nov. 2006	Malaysian group belonging to Genting Berhad; joint venture with the Sepanjang Group	6	114,200
2	Sime Darby	May 2004	Malaysian group, in joint venture with the Benua Indah Group	2	49,398
3	IOI Corporation and Bumijaya Gemilang Agro (BGA)	May 2004 Oct. 2007	IOI is a Malaysian group, in joint venture with BGA, which is part of the Indonesian Harita Group	9	87,094
4	PT SMART	Jan. 2005	Indonesian group, belonging to the Sinar Mas Group	4	82,500
5	First Resources	Mar. 2008	Indonesian / Singaporean group, belonging to First Resources Group (formerly Surya Dumai Group)	6	115,650
6	First Mujur Plantation and Industry	June 2008	Indonesian Group, owned by the Artha Graha / Tommy Winata Group	3	70,000
7	Sampoerna Agro	June 2007	Union Sampoerna Triputra Persada is a joint venture of the Indonesian Sampoerna Agro and Triputra Persada Groups	2	11,524
8	Austindo Nusantara Jaya Agri (ANJ)	Feb. 2007	Indonesian group belonging to the Austindo Nusantara Agri Group	1	29,400
9	CTP Holding	May 2004	Joint venture of Cargill (USA) and the Temasek Group from Singapore	4	48,977
Total number of subsidiaries linked to RSPO members					37
Total number of active subsidiaries (2008)					18
Total land bank (ha)					612,747
Total area allocated to oil palm (ha), including non-RSPO members					1,422,000
Share of RSPO members in total area					43%

■ *RSPO member companies operating in Ketapang district. (Source: MileuDefensie & Walhi Kalbar 2009)*

on Section or Business Lines which are allocated for Small Enterprises/ Type of Business Open to Medium or Large Enterprises with partnership requirements;

17. Minister of Environment Regulation No.11 of 2006 on Types of Business and/or Activities that Have to Conduct Environmental Impact Assessment;
18. Minister of Agriculture Regulation No.26/Permentan/OT.140/2/2007 on Plantation Business Licensing Guidelines;
19. Local Regulation No.5 of 2006 on Medium Term Development Planning of Ketapang district;
20. Local Regulation No.9 of 2008 on Government Affairs under the authority of Ketapang district;
21. Local Regulation No.11 of 2008 on Official Organisation of Ketapang district;
22. Local Regulation No.19 of 2009 on the Licenses and Supervisions of Plantation Business with Partnership Schemes.

Ketapang district regulation No. 19 of 2009 on the Licenses and Supervisions of Plantation Business with Partnership Schemes

Application requirements and procedures of plantation business permits

According to Article 17 of Provincial Regulation No. 19 of 2009, to obtain a plantation business cultivation permit (*Izin Usaha Perkebunan untuk Budidaya/IUP-B*) as stipulated in Article 11 paragraph (2), the plantation company must put forward a written application to the Head of District (*bupati*) along with:

- a notary act of establishment;
- Principal Tax Identification Number (Nomor Pokok Wajib Pajak/NPWP);
- a letter of domicile;
- a recommendation on the suitability of the project based on the provincial plantation development macro-plan of the Governor;
- a location permit from the Head of District along with a map of the indicative location of the project;
- technical considerations on land availability from the Forestry Department (in case the requested land is located in forest areas);
- a proposal on plantation development;
- an environmental impact assessment (Analisis

Mengenai Dampak Lingkungan/AMDAL) or environmental management plan (*Upaya Pengelolaan Lingkungan/UKL*) and environmental monitoring plan (Unit Pemantauan Lingkungan Hidup/UPL) consistent with applicable regulations;

- a statement on the capacity to provide facilities, infrastructure and systems to control plant-disturbing organisms;
- a statement on facilities, infrastructure and systems to carry out zero burning land clearing and prevention of fires;
- a statement on the commitment to develop plantation for communities in line with Article 13 together with a proposal and;
- a statement on the commitment to carry out partnership schemes.

Supervision and monitoring

According to Article 36 of Provincial Regulation No. 19 of 2009, companies that have obtained an IUP, IUP-B or IUP-P as stipulated in Article 15 are required to:

- settle issues relating to rights in land within two year of issuance of the IUP-B, IUP-P or IUP;
- implement plantation development and/or processing mill units in line with a feasibility study, technical standards and applicable regulations;
- have in place facilities, infrastructures and systems to conduct zero burning land clearing and fire control;
- have in place facilities, infrastructures and systems to control plant-disturbing organisms;
- implement an environmental impact assessment (AMDAL) or environmental management plan (UKL) and environmental monitoring plan (UPL) consistent with applicable regulations;
- accelerate and empower local communities/cooperatives and;
- report the plantation's business progress and development to the *Bupati* as stipulated in Article 15 regularly once every six months.

If the requirements above are not met, the company receives warnings (once every four months). Following three warnings, the IUP, IUP-B or IUP-P of the said company is withdrawn and it is proposed to

the relevant authorities that the company's land use rights (HGU) be withdrawn.

Duties and functions of the Task Force (Tim Satuan Tugas/SATGAS) and Implementation Unit (Satuan Pelaksana/SATLAK) of the Sub-districts Plantation Development Supervision Team (Tim Pembina Pengembangan Perkebunan Kecamatan/TP3K)

The two field-level structures of the Sub-districts Plantation Development Supervision Team (*Tim Pembina Pengembangan Perkebunan Kecamatan/TP3K*) are the SATGAS and SATLAK. According to Bupati Decree No.23/2007 on Task Force Team (*Tim Satuan Tugas/SATGAS*) of Ketapang Sub-district Plantation Development Supervision Team (*Tim Pembina Pengembangan Perkebunan Kecamatan Sekabupaten Ketapang*), sub-districts where plantation activities under PIR – Trans (*Perkebunan Inti Rakyat Transmigrasi/Transmigration Nucleus Estate Scheme*), PIR – KKPA (*Perkebunan Inti Rakyat Koperasi Kredit Primer Anggota/Primary Co-operative Credit for Members Nucleus Estate Scheme*) and partnerships are operational, and where pure private plantations¹³ are operational, must carry out the following duties:

- (1) Form a District Plantation Development Supervision team (*Pembina Pengembangan Perkebunan Kabupaten/TP3K*) in Ketapang responsible for carrying out coaching (*penyuluhan*), supervision (*pembinaan*) and control (*pengawasan*) of plantation development on the ground so that the communities/farmers acquire a better understanding and are able to participate in plantation development in accordance with applicable regulations.
- (2) Take inventory of and select farmers to participate in the plantation project based on existing guidelines and applicable provisions and submit this project to the TP3K of Ketapang district.
- (3) Identify and resolve problems obstructing the implementation of plantation development at the sub-district level.

- (4) Report activity results and any unresolved problems at the sub-district level to the head of Ketapang district. Bupati Decree No.23 of 2007o stipulates that all incurred costs from the implementation of the decision are charged to Ketapang district's Regional Annual Budget (*Anggaran Pendapatan Belanja Daerah/APBD*) and other legal sources.

In line with the decree, the SATGAS team should comprise the sub-district head (*camat*) as chair, sub-district armed forces of the Republic of Indonesia (*Danramil Tentara Negara Indonesia*) as vice-chair, the sub-district police head (*Kapolsek*) as vice chair, the head of the sub-district economic secretariat (*Sekretariat*), and, as members, the following: the head of the Regional (Plantation) Technical Implementation Unit (*Unit Pelaksanaan Teknis Daerah/UPTD*); the head of religious affairs; the head of (UPTD) agriculture and livestock; the head of the Dayak customary council (*Dewan Adat Dayak/DAD*); the head of the Melayu Adat Culture Council (*Majelis Adat Budaya Melayu/MADM*); the sub-district deployed armed forces/Indonesian Army (*Tentara Negara Indonesia/TNI*) personnel (*Babinsa*); and the head of civil security (*Kapolpos*) at the sub-district level.

At the village level, the frontline structure is the SATLAK (*Satuan Pelaksana*) or Implementation unit. Its members include the head of hamlet and customary leaders whose main role is to maintain communication between the communities and the company. Dispute identification and settlement are also carried out through SATGAS and SATLAK, based on the Plantation Law and through general criminal codes since the revocation of Article 21 of the Plantation Law by the Indonesian Constitutional Court in 2011. There are, however, no technical guidelines on dispute settlement and the current dispute settlement process tends to adapt to the local circumstances and dynamics of the conflict in question.

Legal land acquisition process in Ketapang district

The land acquisition process for plantation development is carried out by a SATLAK team with reference to the *Bupati* Regulation No. 6 of 2006 on the Guidelines of Compensation. After the company has obtained the Location Permit (*izin lokasi*) they must conduct the land acquisition process with the TP3K directly led by the *bupati* with members of the Local Government Work Force (*Satuan Kerja Pemerintah Daerah/Local Government Work Force/SKPD*). The *izin lokasi* obtained is for valid three years and can be extended provided that the company had acquired 51% of the *izin lokasi* land area, for a period of one year. In Ketapang district, 48 active plantation companies have obtained an IUP (*Izin Usaha Perkebunan/Plantation Enterprise Permit*) out of 77 allocated *izin lokasi*. At the time of writing, and in line with *izin lokasi* holders' obligations under district regulation No. 19 of 2009 on Licensing and Partnership, the government was reviewing 10 *izin lokasi* where activities have not yet been operationalised on the ground.

According to Pak Lukas, Head of district estates crops, PT Bangun Nusa Mandiri has obtained a Plantation Enterprise Permit (*Izin Usaha Perkebunan/IUP*), and the AMDAL documents were examined (and approved) by the provincial AMDAL committee in Pontianak, but the District Plantation Office reportedly does not hold copies of the *Izin Lokasi* and IUP, or of the regular plantation development progress reports and AMDAL for PT BNM. According to the District Plantation Office, PT BNM carries out its management operations through both HGU nucleus estates and cooperative HGU titles for plasma plantations in its partnership scheme with the communities. Both nucleus and plasma plantations are managed under a one-roof management model (*Kemitraan Manajemen Satu Atap/KMSA*) for quality of management insurance. The Estates Crops Office of Ketapang district only supervises the plantation development for the first 48 months. Once the oil palm plots have been verified, they are handed over to the

cooperative and placed under its authority. If the company's HGU expires, it can be extended based on a partnership agreement submitted to the *bupati*. The credit ceiling is Rp. 49 to 50 million (USD 5,050 – 5,155) of incurred plantation development costs per hectare in category 3 regions,¹⁴ which are determined by a Decree of the Director of Estate Crops of 2011.

The district government generates incomes from the Tax on Acquisition of Land and Building (*Bea Perolehan Hak atas Tanah dan Bangunan*/BPHTB)¹⁵ and honorary fees from the Tax on Land and Building (*Pajak Bumi dan Bangunan*/PBB). Ketapang district and the Association of Indonesian District Governments (*Asosiasi Pemerintah Kabupaten Seluruh Indonesia*/APKASI) have put forward a proposal with regard to plantation benefits and impacts in their own respective regions. At the time of writing, the priority of the government was to prepare the Indonesian Sustainable Palm Oil (*Komisi Perkebunan Kelapa Sawit Berkelanjutan Indonesia*/ISPO) through funding trainings for the technical implementation of plantations and assessments of plantation businesses.

Concerns in the palm oil sector

In an official speech, the governor of West Kalimantan province, Drs. Cornelis MH highlighted the findings of an evaluation conducted by the West Kalimantan Directorate of Estates Crops/Plantations reporting widespread problems in the development of the plantation sector in the region. One of the problems identified is the divergent interests and discrepancies in understanding of those conducting general policy and technical development of plantations in West Kalimantan. As a result, several plantation companies have acquired their IUP and the necessary permits but have never carried out the physical plantation developments on the ground. According to data from the province's Directorate of Plantations, the 290 *Izin Lokasi* and IUP that the district authorities have issued cover a total area of around 4.6 million ha.

If implemented properly, each plantation company could employ 300 workers, or 870,000 workers in total for all companies having obtained these permits. However, only 10% of the lands covered by these permits are currently in operation, and so unemployment rates in the region remain high.

This reality is exacerbated by widespread conflict between communities and oil palm plantation companies, mostly resulting from overlapping land claims, inconsistent partnership implementation and land acquisition conducted without or against agreements between the company and the local communities. In some cases, the disputes have led community members to oppose all oil palm development. Finally, another major problem in West Kalimantan has been the repeated occurrence of fires and haze in the operation areas of plantation companies, the impacts of which have been felt not only by of the inhabitants of the region but as far as Malaysia and Singapore.¹⁶

In a statement made in the Pontianak Post in 2008, Drs. Cornelis MH officially urged the head of districts to review issued plantation permits, and if necessary, to adopt measures to stop issuing new permits. The governor also warned against imposing oil palm development alone on local communities, instead recommending the equitable promotion of other crops that local communities are more familiar with. He also noted that local communities should have the final say in these decisions affecting their livelihoods.

Golden Agri-Resources Ltd ('GAR')

Golden Agri-Resources (GAR) is the second largest integrated palm oil company in the world with a land holding of around 446,200 ha (including plasma plantations) in Indonesia as of 30th June 2011.¹⁷ GAR was established in 1996 and has been listed on the Singapore Stock Exchange since 1999 with a market capital of around USD\$ 6.7 billion as of 30th June

2011.¹⁸ Flambo International Ltd. is the largest shareholder in GAR with 50% of total shares. GAR has a number of active subsidiary companies, including PT SMART Tbk which has been listed on the Indonesian stock exchange since 1992.¹⁹ In Indonesia, GAR's operations are the cultivation of oil palm, and the processing and refining of Fresh Fruit Bunches (FFB) into Crude Palm Oil and Palm Kernel Oil and value-added derivatives such as cooking oil, margarine and shortening. The company also has an integrated operation in China which includes a deep sea port and a Palm Kernel Oil processing mill for refining edible oil products and other foodstuffs.

GAR became an RSPO ordinary member in 2010 after strong international campaigns from Greenpeace accused the company of systematic and persistent violations of RSPO standards and issues of legality in SMART/GAR subsidiary oil palm plantation companies in West and Central Kalimantan.

Sinar Mas Agro Resources and Technology Tbk (PT SMART Tbk)

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SMART, a sister plantation of Golden Agri-Resources Ltd., is one of the leading palm oil producers in Indonesia with a total landholding of around 138,100 ha (including plasma plantations) as of 30th September 2011.²¹ SMART was established in 1962 and has been listed on the Indonesian Jakarta Stock Exchange since 1992. Like GAR, SMART claims to focus on the sustainable production of CPO, PKO and value-added derivatives.²² Besides cooking and industrial oil, the refining palm oil derivatives are also marketed under trademarks such as Filma and Kunci Mas. SMART manages all the oil palm plantations of the GAR holding. This business relation is particularly profitable for SMART in terms of plantation management, information technology, research and development, purchasing raw materials and access to wider market networks, both domestic and international.

GAR Social and Community Engagement Policy (SCEP)²³

1. GAR wants to ensure that its palm oil operations improve the lives of those it impacts. Core to this is a commitment to:

- a. Free, Prior and Informed Consent of indigenous people and local communities
- b. Responsible handling of complaints
- c. Responsible resolution of conflicts
- d. Open and constructive engagement with local, national and international stakeholders
- e. Empowering community development programmes
- f. Respecting human rights
- g. Recognising, respecting and strengthening the rights of its workers
- h. Compliance with all relevant laws and internationally accepted certification principles and criteria

2. We adopt this Social and Community Engagement Policy for all the plantations that we own, manage or invest in regardless of the stake.

3. To promote this Social and Community Engagement Policy across the palm oil industry, we will leverage our leadership position and advocate this policy in partnership with the Indonesian and global community.

4. Free, Prior and Informed Consent of Indigenous and Local Communities

In line with GAR's Forest Conservation Policy, GAR respects and recognises the long term customary and individual rights of the indigenous and local communities to their

land, and commits to ensuring free, prior and informed consent from these communities prior to commencing any new operations. Implementation of this policy will include:

- Participatory mapping of all indigenous and local community lands prior to negotiation
- Social Impact Assessments carried out in a participatory manner, the results of which will be publicly available and actively shared with relevant stakeholders
- Open negotiation processes
- Documented agreements signed by all relevant parties

5. Responsible Handling of Complaints

We will develop and maintain processes for the responsible handling of all complaints at the local, national, and international levels. These processes will be developed in consultation with stakeholders, and will be made publicly available.

6. Responsible Resolution of Conflicts

We commit to actively promoting and supporting the responsible resolution of any conflicts involving GAR operations. This will include working with relevant stakeholders to ensure that conflicts are resolved through a process that is agreed upon by all relevant parties involved, respects customary and individual rights, and ensures the free prior and informed consent of relevant stakeholders to any resolution agreements. We also commit to doing our best to prevent any use of force which could unnecessarily lead to violence.

7. Open and Constructive Engagement with Local, National, and International Stakeholders

We commit to actively and constructively engaging with all GAR's stakeholders, including communities, government, customers, and civil society at the local, national and international levels. This includes a commitment to make information regarding the impacts of our operations publicly available. We will seek to ensure that information is provided in formats and languages relevant to affected stakeholders.

We also commit to open and transparent negotiation for all joint management activities.

8. Empowering Community Development Programmes

We will continue to develop and implement empowering community development programmes for the local communities in which we operate. These programmes will be developed through an open, consultative and collaborative manner with local stakeholders. Our community development programmes will seek to empower communities in their development of sustainable livelihoods.

9. Respecting Human Rights

We commit to upholding and promoting the Universal Declaration of Human Rights for all workers, contractors, indigenous people, and local communities in all company operations.

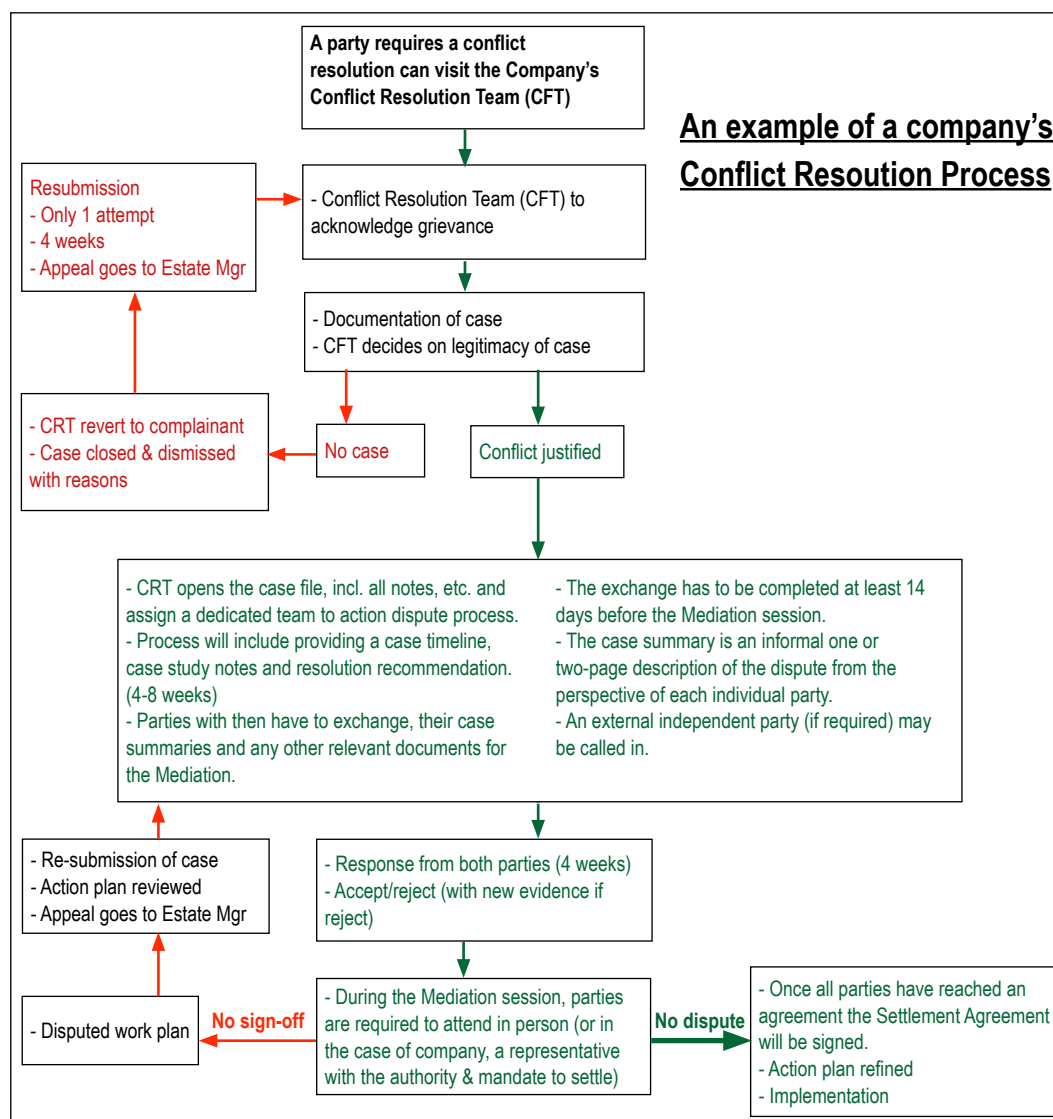
10. Recognising, Respecting and Strengthening the Rights of All Workers

We commit to ensuring that the rights of all people working in our operations are respected according to local, national, and ratified international laws. We provide equal opportunities for all workers, and embrace diversity regardless of ethnicity, religion, disability, gender, political affiliation, sexual orientation or union membership. This is in line with GAR's internal Human Resource Policy.

11. Compliance with All Relevant Laws and Internationally Accepted Certification Principles and Criteria

We will continue to comply with all relevant laws and regulations as well as internationally accepted certification principles and criteria.

Developed by GAR in consultation with The Forest Trust (TFT)
10th November 2011



■ *Chart of Conflict Resolution Process of Golden Agri-Resources (GAR/SMART)²⁴*

GAR's conflict resolution process

Parties seeking conflict resolution with GAR can contact the company's Conflict Resolution Team (CRT) which receives grievances or complaints, collects documentation and decides on the legitimacy of the case. If the case is deemed unjustified, it is returned to the complainant and closed with a justification. The case can then be resubmitted within four weeks with an appeal submitted to the Estate Manager. If the case is deemed justified, the CRT consults all documents and notes relevant to the case and sets up a team to handle the dispute process. The dispute

settlement process takes four to eight weeks during which the parties are invited to exchange case summaries and other documents 14 days prior to mediation. An informal one to two page summary of the case is then developed and an independent third party appointed to provide impartial support if needed. Responses from both parties are required within four weeks. All parties are expected to attend the mediation meetings (in the case of the company, this can be a representative with the authority and mandate to resolve the case). Once all parties have reached an agreement, a Settlement Agreement is signed by all parties which includes final action and implementation plans. If agreement cannot be reached, the case can be resubmitted and the work plan reviewed. An appeal is raised to the Estate Manager who will hand over

the case to the Conflict Resolution Team to re-check documents and other evidence.

RSPO certification of GAR/SMART

On 19th January 2012, PT Ivo Mas Tunggal (IMT), a sister plantation of GAR announced that the company had been awarded RSPO certification for two of its subsidiary oil palm plantations, PT Ramajaya Pramukti (RJP) and PT Buana Wiralestari Mas (BWL).²⁵ According to the GAR Time Bound Plan (TBP), all subsidiary oil palm plantations and mills under GAR holding and under the management of Sinar Mas are to receive RSPO certification by 2015. Pursuant to RSPO Certification Systems, the legitimacy and consistency of the TBP's implementation will have to be reviewed and assessed by Certification Bodies (CB) to verify, *inter*

alia, whether there are unresolved land conflicts, labour issues, irregularities and/or non-compliance with applicable laws. The terms of assessment require the company management to ensure that any identified non-compliance and outstanding problems are properly resolved or that pre-certification operations are suspended where major non-compliance in any of the partial certifications requirements are identified by the CB.

PT Bangun Nusa Mandiri (PT BNM)

PT BNM is a subsidiary oil palm plantation company of SMART and fully owned by GAR. PT BNM was established as a legal entity through a notary deed registration dated 15th October 2004. According to AMDAL reports, the company has received the following permits to date:

No.	Permit documents	Issuing body	Remarks
1	Informasi Lahan No. 525/379/IV-Bapedalpemda	The Ketapang district head has approved 20,000 ha out of 25,000 ha proposed by the company. This permit is valid for a six-month period with one extension if the pre-survey is not yet fully completed.	The applicant company is required to conduct a pre-survey and <i>sosialisasi</i> after obtaining a survey permit from the Ketapang district planning agency and subsequently to share the survey and <i>sosialisasi</i> findings with district government.
2	Izin Lokasi No. 387, 21st December 2004	The <i>Bupati</i> has approved 24,000 ha out of 25,000 ha proposed by the company. ²⁶ The approved location sites are Tanjung village, Batu Kasur village, Sengkuang village, and areas adjacent to Jelai Hulu and Marau sub-districts. ²⁷	Prior to land acquisition the company must conduct <i>sosialisasi</i> . Land acquisition has to be completed within three years of the issuance of the permit. The permit can be extended if the company has already obtained more than 50% of the total <i>Izin Lokasi</i> land. The <i>Izin Lokasi</i> does not diminish or reduce rights of prior owners or tenants over land. ²⁸
3	Bupati Decree No. 31 of 2008 regarding the extension of PT BNM's Location Permit ²⁹	Signed by the Bupati of Ketapang pursuant to a letter of request for extension by PT BNM on 17th September 2007. ³⁰ This extension letter was valid until 23rd January 2009.	An extension requires evidence that PT BNM has conducted activities over part of the permitted land sites pursuant to Bupati Decree No. 367 of 2004 for land of approximately 24,000 ha in other land uses (<i>Areal Penggunaan Lain/APL</i>). The Decree requires that the application be approved or rejected within a 30 day period.
4	Bupati of Ketapang Decree No. 489 of 2008 regarding the extension of the Location Permit for oil palm plantation and processing mill development of PT BNM ³¹	Approved by the Ketapang district Bupati in response to a letter from PT BNM requesting an extension ³² of the <i>Izin Lokasi</i> in areas around Manis Mata sub-district, Air Upas sub-district, Jelai Hulu sub-district, and Marau sub-district.	This letter replaces the previous Bupati Decree No. 31 of 2008 on the grounds that there are legal shortcomings in the previous Decree. ³³ The request letter from PT BNM, dated 17th September 2007, is not enclosed as a legal document as part of the AMDAL report.
5	AMDAL No. 110 of 16th March 2009	Approved by West Kalimantan Province AMDAL Evaluation Commission	Operating sites covered by the AMDAL are: Manis Mata sub-district, Jelai Hulu sub-district, and Marau sub-district in Ketapang district. The total area covered by the AMDAL is of 20,000 ha, including a mill with a processing capacity of 80 tons of FFB/hour.

In April 2008, PT BNM officially began its operations in parts of Jelai Hulu sub-district, Ketapang district, in particular the administrative territories of Priangan village and Biku Sarana village (Bayam-Sungai Lalang hamlet). Jelai Hulu sub-district shares administrative borders with Marau sub-district. The PT BNM concession in Priangan (Riam) village and Biku Sarana (Bayam-Sei. Lalang) also shares direct borders with the adat territory of Silat Hulu hamlet, Bantan Sari village, Marau sub-district.³⁴ More recently, the company has expanded its clearing and planting to hamlets and villages in Air Upas and Manis Mata sub-districts.³⁵ PT BNM planned to establish a mill of a processing capacity of 480,000 tons per year in 2012, located near the water ways of Deramuk and Sekelampian rivers. At the time of writing, the construction of the processing mill had not yet begun.

Environmental Impact Assessment (AMDAL)

After several unsuccessful attempts to obtain the AMDAL document, among others (including copies of the *izin lokasi*, *izin usaha perkebunan*, High Conservation Value (HCV) Assessments, smallholder scheme agreements, land acquisition reports and conflict resolution mechanisms), at the field office and the Ketapang office, the researchers were finally able to access a copy of the AMDAL from the AMDAL Commission of West Kalimantan Province.

■ PT BNM oil palm plantation development planning.
(Source: Plantation and Processing Mill development plan of PT BNM 2008; AMDAL report 2009. Page II – 9).

No.	Development planning	Acreage	
		Hectares	%
1	2009	1,000	5.23
2	2010	2,000	10.53
3	2011	4,000	21.06
4	2012	4,000	21.06
5	2013	4,000	21.06
6	2014	4,000	21.06
	Total	19,000	100.00

The AMDAL, dated 14th March 2008 and produced by CV Intergraha Citra Persada (CV ICP), describes both positive and negative impacts of the company's proposed development. The positive impacts include improved community and local revenues, and employment generation. The negative impacts documented include conversion of natural landscapes, air and water quality deterioration, risk of fires, soil erosion, disturbance of local fauna and flora, hygiene and sanitation concerns, and land conflicts. Land clearing activities are identified as a major factor affecting the quality and quantity of water of the rivers of Terusan, Silat and Deranuk.

The AMDAL report also states that out of the 20,000 ha of *izin lokasi* land within the PT BNM concession, 19,000 ha can be planted, 50 ha developed as nurseries, 100 ha used for roads and infrastructure, 150 ha for office buildings, 50 ha for social and sport facilities, and 650 ha set aside for riparians and land conservation areas. Of the 20,000 ha, 2,029 ha are classified as secondary forest, 10,917 ha as mixed dry agricultural farmlands and 7,054 ha as shrubland/grassland.

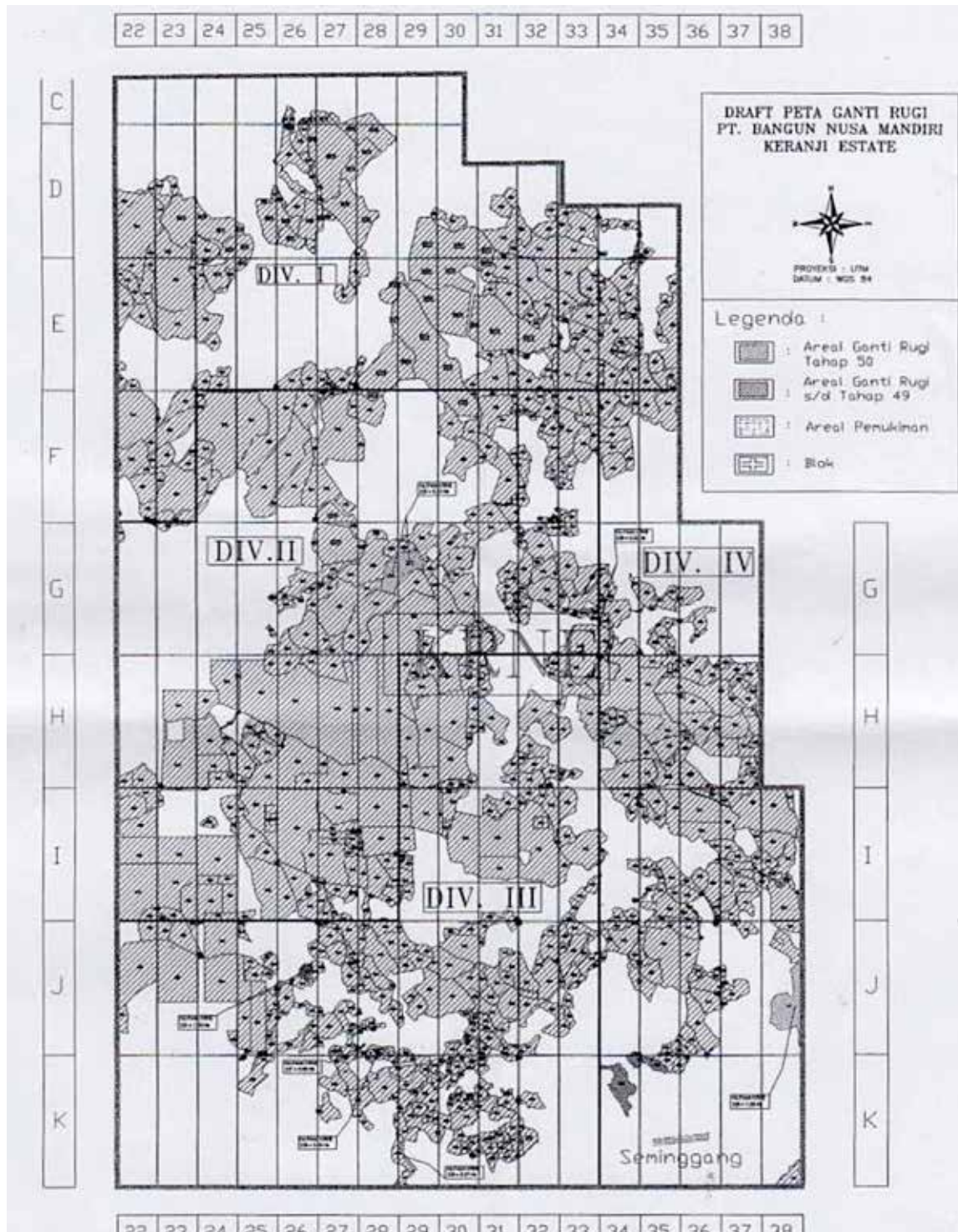
However, the AMDAL does not make any mention of the impact of the development project on the food security and livelihoods of the affected local communities, or what alternative options exist, or should be developed, to ensure that local livelihoods are sustained if all lands are converted to oil palm. This is particularly important given that the area in question is already largely surrounded by other companies' oil palm concessions.

Protected animal species within the concession area include the proboscis monkey/Bekantan (*Nasalis Larvatus*), java mouse-deer/Kancil (*Tragulus javanicus*), muntjac/Kijang (*Muntiacus muntjak*), leopard cat/Kucing Hutan (*Felis bengalensis*), sambar deer/Rusa/Payau (*Cervus unicolor*), and the sunda pangolin/Terenggiling (*Manis javanica*). The report highlights that the land clearing will damage the habitat of these rare

and protected species, and consequently, their range and populations. Protected flora species within the concession area include Durian Hutan (*Durio zibethinus*), bread fruit/ Cempedak Hutan (*Artocarpus sp*), Rambutan Hutan/Tenggaring (*Nephelium sp*), Ulin/Iron Wood (*Eusideroxylon sp*), light red meranti/ Tengawang (*Shorea stenoptera*), Kempas (*Koompassia malaccensis*), Benggaris (*Koompassia sp*), and Jelutung (*Dyera*

costulata). It is unclear how the company intends to manage or conserve these species, and no map is included in the AMDAL to specify the location or types of these species within the concession.

■ Map of land acquisition and development of PT Bangun Nusa Mandiri. (Source: PT BNM Document & Licence copy of land acquisition target)



Peoples and land tenure

The majority of the population inhabiting the PT BNM concession are indigenous Dayak Jelai whose livelihoods largely depend on the land and ecosystems therein, in particular the tropical rainforests and rivers. According to ethnolinguistic research conducted by Institut Dayakologi, the Dayak Jelai are a Dayak sub-tribe with their own distinct language. The Dayak Jelai sub-tribe population in 2006 (excluding migrants and newcomers) was of approximately 15,275, spread throughout three sub-districts of Ketapang district; Jelai Hulu, Marau and Manis Mata. The new sub-district of Air Upas was formed from the lands of the former Manis Mata sub-district.³⁶

As with other rural communities in West Kalimantan, they make a living as garden-farmers supplemented by products gathered from the forest. Agricultural cycles are intrinsically related to the formation of rights over land. Community members who first clear forest areas subsequently establish rotational crop farms such as rice paddies, which are held in common and subject to different uses, including small-scale rubber cultivation. Such patterns of agriculture, community gardens and forest uses have been exercised for hundreds of years under the customary laws of the Dayak indigenous peoples in these areas. The hub of their social, economic and cultural activities is the *dahas* which comprises settlements, rice cabins and other subsistence activities.

The Dayak Jelai divide the use of their customary forest (*dahas*) and land based on the following classification: (1) *rimba matuq* forest (reserved and conservation areas); (2) *jumpung/papulau* forest; (3) *pesapingan* forest (the borders of people's *lakau*); (4) *lakau mudaq* forest (used or fallow farmland); (5) *lakau humaq* (ongoing cultivation farmland); (6) *panggarak* forest (naturally fallow land covered with vegetation); (7) *kebun presasak* forest (small scale plantations of rubber, coffee, rattan etc.); (8) *pekampongan* forest (fruit plantations); (9) *dahas* (customary forest);

(10) *pamaliq* forest (sacred forest); (11) *itung rrai* (rivers, creeks and springs) and; (12) *pasar pandam* forest (cemetery sites).³⁷ Individual rights over communal land use are established through the recognition by individual persons or groups in the community of the boundaries of individual farmlands. More recently, plantations of commercial commodities such as rubber have intensified and led to the development of new models of individual control embedded within collective ownership over traditional territories. However, research conducted by the Alliance of Jelai Indigenous Peoples of Kendawangan (Aliansi Masyarakat Adat Jelai – Kendawangan/AMA JK) suggests that the foundational element in the formation of rights in land remains customary rituals, namely: 1) *lakau humaq*; 2) *warisan* and; 3) *pa'angkatan* (see box below on 'Customary land laws of the Dayak Jelai'). Once these three different customary law rituals have taken place, an informal individual right in land is established. Rights over land can exist as 1) *hak seketurunan* (lineage/descendent right); 2) *hak tunggal* (single right) and; 3) *hak kolektif/hak bersama* (collective right).

According to some of the Dayak Jelai interviewed, the location of PT BNM's operations is forest land which has customary been collectively used as farmland and reserved lands by local communities. Almost half of the forest land areas have been cultivated with rubber and fruit trees by local communities prior to the arrival of the company.

Land acquisition and Free, Prior and Informed Consent

Government and company representatives interviewed by the research team reported that PT BNM had carried out *sosialisasi* prior to beginning its operations in the form of a big meeting attended by community members and leaders. According to those community representatives who accepted the operations of PT BNM, the purpose of

Customary land laws of the Dayak Jalai

Ways of acquiring rights to land

Lakau humaq: To obtain ownership of land, the individual must clear the primary forest to establish farms. The process of *(be)lakau (be)humag* is usually carried out through *bejuruq bebarai* or *baanasig* (mutual help and cooperation with neighbours to work on new farms). In addition to fostering a spirit of togetherness, social relationships, networking and cultural continuity, *bejuruq bebarai* also functions as an economic means of mobilisation of the workforce. The act of *bejuruq bebarai* is also a physical enactment of the community's recognition of the individual's right to the land cleared. Ownership is further clarified by the drawing of boundaries on the land with planted fruit and rubber trees. Further testifying to ownership, the *dahas*, or customary forest, constitutes the main economic resource passed on to future generations.

Inheritance: Among the Dayak Jalai, family heirs usually inherit their parents' property. These are found inside the *dahas-dakar* which includes source of subsistence, such as the *mudaq lakau* forest, *panggarak* forest, *pekampungan* forest, *papulau* forest and other economically valuable resources.

Duman bagiq pampap balah and pa'angkatan: *Pa'angkatan* and *duman bagiq pampap balah* rights are those given to an adopted family member, in recognition of services rendered, out of affection or compassion. *Pa'angkatan* guarantees that an outsider or local person adopted by a family is provided with a piece of land for farming.

Types of control rights

Land ownership: According to the Dayak Jalai, rights of ownership constitute a pattern of relationships between individuals or groups within a *pedahasan* area (settlements, rice cabins and other subsistence activity areas) and all the resources therein. Rights to lands in the *dahas* are based on the line of descent and

cannot be conferred to individuals who are not subject to local customary law or are outside the patrilineal lineage. The selling or granting of land in the *pedahasan* area to those outside the community is strictly prohibited. In the Dayak Jalai tradition, there is no concept of land transactions.

Lineage-based rights: The right to own land based on lineage results from a shift from individual to collective ownership. *Dahas Tumanang* is an example of this; this *dahas* has been managed by six generations and began with an old man named Upui Tumanang who first opened a farm in this area (he is considered the founder of *dahas Tumanang*, and it was thus named after him). This *dahas* was then passed down to his children, Upui Pinat and Silabang, then to their eight children, then to the three children of the eldest of the eight children, and then to the eldest of his three children, who is still alive and living in *dahas Tumanang* with his own grandchildren and great-grandchildren.

Sole rights: According to *pedahasan* management principles, individual ownership over an area of *pedahasan* is a right held by a single Dayak Jalai person ie sole right. Sole right is usually valid if the *dahas* owner is not yet married. This right of sole ownership can be obtained in several ways, including through clearing forests for agricultural farming (*belakau behumag*) and establishing *presasak* gardens. Thus sole rights over *pedahasan* only apply at the initial stages of clearing by a member of the Dayak Jalai community.

Collective rights: Collective ownership operates over *pedahasan* areas owned by more than one person. This right can be the joint right of a husband and wife, children, grandchildren and great-grandchildren belonging to one line of descent. Even where a *pedahasan*, or indigenous territory (occupied and used land and forest) has expanded over generations, the right of ownership remains anchored in the concept of *sedomong sebenuaq* ('collective ownership under the same customary leader of

the village') which distinguishes between the rights of the growing native population and non-indigenous incomers.

Demonstrable evidence of *dahas* ownership

The demonstration of land ownership is very important within the Dayak Jelai community and is attested to through physical and oral evidence, which are seen by the Dayak Jelai as having equal weight to written proof.

Recognition: Recognition is an important form of proof of ownership for the Dayak Jelai. The most powerful form of recognition comes from individual community members, especially those whose land is directly adjacent to the *dahas* or land over which rights are claimed. A second type of recognition comes from members of the community who affirm that an individual has planted crops (fruit, rubber, coffee etc) at a particular location. The third type of recognition derives from the *damung benuaq*, or customary leader of a group of hamlets within an indigenous territory.

Residential area: The existence of residential houses also testifies to ownership of *dahas*, including the existence of *jurung* (rice barns) that are separate from the houses. Other elements in the residential area may also serve as evidence of ownership, such as wooden or bamboo breeding cages for livestock (*hanyam ingoan*) which are usually located under or behind the house, as well as rice milling and rubber grinding machines.

Pekampongan buah (kampung-kayuan): *Pekampongan* is evidence of ownership in the form of planted fruit trees around the settlement. If a new farm is opened in an old *dahas*, the area where the original fruit trees have been planted is retained. Similarly, descendants who have inherited the *dahas* are expected to maintain the fruit trees and thus these fruit trees become evidence of ownership over the *dahas* area. Today, inter-cropping with natural rubber acts as additional evidence and is an importance source of economic revenue for the Dayak Jelai.

sosialisasi was essentially to explain the terms of partnership between the company and local communities, with reportedly little information shared on other aspects of the project. It thus appears that the land acquisition process was started well before the communities had fully digested all this information and the impacts of the project on their lives.

In a subsequent meeting, the communities were organised to receive compensation for destroyed plants on lands surrendered to the company. Community representatives reported that during the distribution of compensation payment, they were made to sign a letter without getting the chance to read its content properly. Furthermore, they reported not having received receipts of payment or evidence of any transaction upon being given the compensation. Community representatives also reported not possessing documents to testify that they had surrendered their land to the company,

or that they were engaged in a partnership with the company. According to company representatives, the legitimacy of the community's rights to land surrendered is testified in land release letters. However this claim cannot be ascertained as the company failed to produce and communicate samples of these letters (along with several other documents requested) to the research team, as they had committed to doing.

According to company representatives interviewed, PT BNM only clears land that has been properly released by the communities. The unplanted lands are those that community members refused to release. The research team carried out field visits to both communities that welcomed and opposed the presence of PT BNM. In the case of the former, it was reported by community members that negotiations over the release of land with the company was carried out immediately after most of the lands had been cleared by the company. This was the

Free, Prior and Informed Consent

Colchester and Ferrari 2007 define Free, Prior and Informed Consent (FPIC) as the right of a traditional community to make decisions free of coercion and based on prior information on any matter that affects their land, area and natural resources. FPIC can be formulated as a community's right to obtain information prior to a programme or a development project being carried out on their area, and based on that information, to have the freedom to give or not to give their consent. This means that whoever enters the lands owned by the traditional community should deal with them as the rightful owners, because these people have rights and authority over their traditional lands. The decision-making systems in traditional communities and customary rules in deciding who represents them must be respected and honoured for a genuine and accountable FPIC process. The right to FPIC stems from a community's rights to determine its own destiny based on traditional relationships and historical connections.

However, FPIC processes do not always follow this ideal. This may be due to a number of factors including a lack of appreciation by external parties for the traditional decision-making process; manipulation by leaders of their own traditional institutions or decision-making by the traditional elite for personal gain; and misunderstanding of legal, societal or environmental implications by the *adat* community.

Recognition of the *adat* community's right to FPIC ensures that development schemes for traditional land are only implemented after the community has considered the project and responded by giving their consent based on sufficient information. This is regarded as 'good practice' or as a necessity in a number of development projects, resettlement schemes, social and environmental assessments, construction of dams, operation of extractive industries, logging and oil palm plantations, preservation of traditional intellectual and cultural riches, credit for small business, and establishment of protected areas (Colchester & McKay 2004).

case for one landowner who was approached by the company to discuss compensation right after his land had being cleared. The landowner had no choice but to accept the presence of the company and the amount of compensation offered. After the land had been measured, the company asserted that the area of the land in question was of 12 ha, four ha less than the landowner claimed. In another case, a community member voluntarily gave away his land but did not receive compensation for over a year. The research team also interviewed company representatives, most of whom were recently employed staff who were not involved in the earlier processes of land acquisition. According to these representatives, delays in compensation payment resulted from unresolved overlapping land claims. Furthermore, compensation was only provided for damaged crops and plants but not for community lands ('compensation for planted crops' or *ganti rugi tanam tumbuh/ GRTT*).

The case of Silat Hulu³⁸

Silat Hulu hamlet is a small *kampong* (village) settlement of 71 households and a population of 258. Since September 2009, this small hamlet has been led by Pak Ritung, acting as interim head of Silat Hulu hamlet. Prior to him, the representative of the village was Mensuin, who was reported to have ignored his duties and responsibilities as well as failed to fight for the rights of his community, and was thus replaced by Pak Ritung by vote in early September 2009. Pak Ritung was a former member of the Bantan Sari Village Assembly Board (*Badan Permusyawaratan Desa/BPD*).

The indigenous customary territory of Silat Hulu hamlet comprises production forest areas, farmland (*pelakauan*), *pedahasan* (or *pedukuhan*) and community rubber plantations and settlements. The total area of the customary territory of Silat Hulu hamlet is approximately 15 km² and it shares

boundaries with Manggungan hamlet to the north, Bayam – Sungai Lalang to the south, Riam/Priangan to the east and Pemintuan hamlet (of Sengkuang village, Air Upas sub-district) to the west. The lands lie on plains and hills with a few patches of wet marsh, and are strategically placed at the junction of three sub-districts, Marau, Jelai Hulu and Air Upas.

Silat Hulu hamlet is inhabited by a majority of Dayak Jelai people as well as some Dayak Kendawangan indigenous people, nearly all of whom make a living as rubber farmers or tappers in plantations they have owned and used for generations. Relations within the hamlet and with neighbouring villages are cordial and peaceful, characterised by mutual respect and strong kinship ties. No crime or court procedures were documented in the village prior to the arrival of PT BNM and the subsequent loss of customary lands. The people of Silat Hulu self-identify as '*masyarakat adat*' (indigenous peoples or communities governed by custom). Their livelihoods depend on natural resources such as forest, land and water, all of which are managed in accordance with customary law. Forest produce gathering and agriculture are

carried out in *kabun-prasasaq* (agroforest vegetation), *lakau humaq* (fallow lands), *pandam-pasaran* (graveyards) and other areas.

For the Dayak indigenous peoples of Silat Hulu hamlet, farmland, rubber gardens and fruit gardens are intrinsically related to the survival of the community, socially, economically and culturally. This is even more prominent with regards to graveyards and associated funerary rites which are a fundamental part of their rich traditions and values. The protection of graveyards, and the trees growing within them, is widely considered as the ultimate form of showing respect to the spirits of the ancestors.

The boundaries of Silat Hulu's lands with other hamlets of neighbouring villages are clear to all members of these communities who share equal access to these lands, and so far no significant problems have arisen as tenure relations continue to be well regulated by customary law. Problems began in April 2008, when PT BNM evicted local communities and bulldozed community property (including farmland, rubber plots, fruit gardens and two graveyards) amounting to 350 ha.

■ Research team with indigenous leaders in Silat Hulu
/ Norman Jiwan



From the very beginning, the Dayak indigenous peoples of Silat Hulu made clear their refusal to give their lands away to PT BNM, but it appears that little attention was paid to their views, or to the fact that under customary laws, land cannot be sold to third parties such as private companies. While some of the lands cleared by PT BNM were surrendered by the inhabitants of Silat Hulu, others were cleared without their consent. The former village head agreed to oil palm development but it is unclear whether his stepping down was as a result of this decision. Land clearing was first conducted on 10th April 2008, when PT BNM, under the command of public relations staff Nur F.X. bulldozed through a customary territory of Silat Hulu near the hamlet's boundaries with Riam (Priangan) village. The purpose of the clearing was to make way for a company main road that would run through a *Kampung Buah* of Silat Hulu hamlet in *dahas tarusan*. Silat Hulu demanded respect for their rights on three occasions but these demands have never been met. One month later, on 7th May 2008, the company bulldozed through more customary territory of Silat Hulu, again under the command of public relations staff Nur F.X. On 8th July 2009, further clearing was carried out over 180 ha of customary land in *pendahasan penkayasan* and *arai panjang*, as well as in *sungai gahang* farmland in early August of the same year. From 10th to 14th August 2009, the company cleared *pedahasan tangiran* and destroyed two graveyards owned by local residents of Silat Hulu. Continued clearing in September 2009 led to a big gathering of Silat Hulu community members who seized two bulldozers and other company operational machinery, demanding respect for customary rights and compensation for destroyed and lost crops and land.

Throughout this conflict, the community members of Silat Hulu have made it clear on a number of occasions that they want a peaceful resolution of the problems, and not escalated conflict. Repeated efforts have been made to try to make room for

a process of conflict resolution, including through discussion, negotiation and the enforcement of customary law.

Violations of customary values and laws

Community representatives interviewed describe the violations of customary law by PT BNM and consequent necessary sanctions as follow:

1. The degradation of customary territory is a violation of the *adat* law of *merusah belalai belayu* and the consequent sanction should be one *tajau* (an antique large water jar), one *singkar piring* (a type of plate) and one *tatak mangkuk peturuk* (a type of bowl).
2. The bulldozing of planted crops (fruit and economically valuable rubber) is also a violation of the *adat* law of *sumpah serapah paju bilai* for which the company should provide two *buah tajau*, one *singkar piring* and one *tatak mangkuk peturuk*.
3. The trespassing of PT BNM on the *adat* territory of Silat Hulu without permission and notification to the hamlet leader and *demung benuaq* (customary chief) is a violation of the *adat* law of *langkah batang jajak tunggul kepada demung tua* and the company is required as compensation to provide three *lasak* (or two *tajau*).
4. The intentional neglect of the authority of the *demung tua* is a violation of the *adat* law of *merurut muka menampar atik pelecehan damung tua* for which the company is charged with three *lasak* (or two *tajau*).
5. The destruction with bulldozers of fruit gardens, in particular young trees not yet bearing fruit is a violation of the *adat* law of *dara diumbungan kampung buah kabun pasah* and requires the company to compensate with three *lasak* (or two *tajau*, one *singkar piring* and one *tatak mangkuk peturuk*).
6. The hoarding of farm fields owned by Silat Hulu residents is a violation of the *adat* law of *menungkal menjuaran*

membuta mengicingan mata membaji menyakit di lakau humaq and the company is required to provide three *lasak* (or two *tajau*, one *singkar piring*, one *tatak mangkuk peturuk*, one *botol tuak* (bottle of sticky rice wine), and *tampung tawar along dingin darah manok* (chicken blood).

7. The destruction of valuable trees and forest for replacement with oil palm is a violation of the *adat* law of *kantung membaliki api atau tunggul begarak batang bekalih* and is sanctioned with six *lasak* (or four *tajau*).

In total, the charges of the communities against PT BNM amounted to fifteen *tajau*, four *singkar piring* and four *tatak mangkuk*. On 19th November 2009, PT BNM paid these *adat* charges, thereby acknowledging that it had committed violations against *adat* values and norms by destroying farmland, crops, fruit trees and forests. In accordance with Silat Hulu customs, this mutually accepted settlement of grievances marked the end of the conflict and they resumed their daily lives and routine activities.³⁹

■ *Encroachment on the customary lands of the Silat Hulu community / Norman Jiwan*



Dongeng pandir cakap warah kita karena hukum udah putus perkara udah habis. Tuak tumpah manok mati, di arai tidak begumbang di batu tidak beguyah, licin betuang halus becanai. Halang mencangking dapat, ular menalan kanyang.

The problem was resolved, rice wine was spilled, the chicken was sacrificed. The river was no longer surging, the rocks no longer moved, everything went smoothly. The eagle was grasping its prey, while the snake was full from eating its prey.

Legal analysis of PT BNM's rights to land

The case of PT BNM in Ketapang district exemplifies how the acquisition of lands belonging to local communities in the name of oil palm is facilitated by weak protection in the law of community rights in land, forests and other areas critical to their livelihoods. A number of these legal loopholes are outlined below.

- a. 'Control for the greatest welfare of the people over land, air and natural resources' as stipulated in Article 33 of the Indonesian Constitution of 1945 is unilaterally interpreted and achieved by the government through models

Japin and Vitalis Andi vs PT Bangun Nusa Mandiri

In 2009, allegations of a violation of Article 21 of the Plantation Law of 2004 were made against Japin of Silat Hulu hamlet and Vitalis Andi, member of *Desa Mahawa* and Secretary General of AMA JK. Japin and Vitalis Andi were accused of intentionally taking action to cause damage to PT BNM's plantation and assets in Bayam hamlet, using plantation land without permission and undertaking other actions to interrupt the operations of the company, either alone or in collaboration, on 29th September 2009 and at other instances in the course of 2009.

The case was taken to the Ketapang District Public Court, who ruled on 28th February 2011 in its Decision Number 151/Pid.B/2010/PN.KTP that the actions of the defendants had resulted in the disruption and delay of the company's operations, as well as material loss in the amount of approximately Rp. 122,000,000 (USD \$13,555). Both defendants were found guilty of criminal activity pursuant to Article 47 Section 1 of the Plantation Law of 2004, Article 55 Section 1 Point 1 and Article 368 of the Civil Code. Japin and Vitalis Andi were fined Rp. 2,000,000 each (USD \$222) and sentences to 18 months in prison.

Represented by the Indigenous Peoples' Defenders Team (*Tim Pembela Masyarakat Adat* - TBMA), Japin and Vitalis Andi put forward an appeal against the ruling of the Ketapang District Public Court to the Provincial Public Court in Pontianak. The Provincial Court supported the ruling of the Ketapang District Public Court in Decision 73/PID/2011/PT.PTK on 4th May 2011. Subsequently, the defendants

Japin and Vitalis Andi and their TPMA lawyers put forward a further appeal against the decision of the Provincial Public Court to the Supreme Court in Jakarta. In its Ruling Number 2292K/Pid.Sus/2011 on 21st June 2012, the Supreme Court rejected the appeal of the defendants and confirmed the decision and sanctions of the Ketapang District and Pontianak Provincial Public Courts.

Public Interest Lawyer Network Indonesia (PILNET) brought the case of Japin and Vitalis Andi vs PT BNM to the Judicial Review of Articles 21 and 47 of the Plantation Law of 2004 at the Constitutional Court in September 2011. PILNET noted that the Plantation Law disproportionately favours the interests of the private sector over those of indigenous and local communities, who find themselves easily criminalized for any unspecified action or behaviour that is deemed to undermine the operations of oil palm companies, leading to risks that these clauses may be abused and misused by companies to the detriment of local communities (see Appendix: The Ruling of the Constitutional Court of the Republic of Indonesia).

The Constitution Court endorsed the petition of the applicants and found Articles 21 and 47 to be contrary to the Constitution of the Republic of Indonesia 1945. The ruling of the Constitutional Court confirmed the constitutional rights of the community of Silat Hulu, noting that the aforementioned Articles contravened the State's obligation to take full and effective affirmative measures to respect, recognise, protect and fulfil the rights of local communities.

and development programmes which are devoid of democratic participation, including in oil palm development plans. In practice, oil palm development is imposed on communities without providing them with any substantial bargaining position or right to negotiate or simply reject the terms of the development.

b. With regard to land, the government has locked itself into a narrow interpretation of State land which has become the object of large-scale oil palm plantations. Even though Indonesian laws make clear the distinction between unencumbered State land with free status and State lands encumbered with rights, in practice, such legal distinctions do not provide strong

enough protection to community control, management and use of their lands.

- c. Government authorities require evidence of ownership in the form of land titles or certificates to prove actual encumbered rights over State lands, in line with land administration regulations. Such land administration laws do not recognise different forms of land rights, such as those over lands that are not occupied or otherwise actively or regularly used by individuals yet which hold vital functions for communities and their livelihoods, such as forested areas, watersheds and other social and cultural sites.
- d. Weak regulations and lack of knowledge and understanding on the part of government authorities on community tenure systems at the local level create a power imbalance which disfavours communities in negotiations with companies. On the one hand, the company uses the permits issued by the government to negotiate ways of obtaining community lands. *Izin lokasi*, for example, is in practice always interpreted as a right

over the entirety of the lands and areas stipulated in the location permit. On the other hand, the communities lack adequate support and information to contest and prevent the conversion of their lands and patterns of livelihoods without their full and informed consent.

- e. One consequence of this imbalance in bargaining power is that communities often find themselves compensated only for damages to their crops, which is far from adequate considering the radical changes in their lives and the threats to their economic security that such developments entail.⁴⁰

The obstacles described above have resulted in widespread neglect by the government of its obligation to give full and effective protection to the constitutional rights of indigenous peoples and local communities. As has been discussed extensively in other sources, these violations are in breach of at least the following articles of the 1945 Constitution:⁴¹

Article	Substance of the article
Article 18B	(1) The State recognises and respects units of regional authorities that are special and distinct, which shall be regulated by law. (2) The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.
Article 28F	Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.
Article 28H	(1) Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care. (2) Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness. (3) Every person shall have the right to social security in order to develop oneself fully as a dignified human being. (4) Every person shall have the right to own personal property, and such property may not be unjustly held possession of by any party.
Article 28I	(2) Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment. (3) The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations. (4) The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government.

Article	Substance of the article
Article 33	<p>(1) The economy shall be organised as a common endeavour based upon the principles of the family system.</p> <p>(2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.</p> <p>(3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.</p> <p>(4) The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.</p> <p>(5) Further provisions relating to the implementation of this article shall be regulated by law.</p>

Laws in Indonesia require that land acquisition for private interests be conducted under a civil code or private code mechanism implemented through a process of buying and selling and the transfer of rights of a private nature. However, the involvement of the government authorities in these processes means they are treated as public law processes based on public development interests and all too often lead to the extinguishment of community rights in land. The engagement of the government is evident in terms of institutions, capacities and resources incorporated in the District Plantation Development Team (*Tim Pembina Pengembangan Perkebunan Kabupaten/TP3K*).

If the process is carried out under private law procedures, land acquisition activity for large-scale oil palm plantations is subject to all applicable rules and regulations for the legal actions of engagement (*perikatan*), buying and selling (*jual beli*) and contract (especially for partnership scheme processes). Yet field findings in the PT BNM case give a strong indication of violations of the principle of freedom of contract, suable by law and which have resulted in community land being transferred to the government to then be leased to an oil palm company without the communities' consent (see Box on 'Principles of contractual agreement'). Unfulfilled and compensation agreements and land clearing prior to receiving community consent (and even where communities have rejected the project) reported by community members further confirm these violations.

Further investigation of the PT BNM land acquisition process revealed that community

lands were surrendered to the company through release of rights (*pelepasan hak*). According to Ari Sukanti Hutagalung, Professor of Agrarian Law at the University of Indonesia, the release of rights in land consists of a legal action whereby a previously existing legal relationship between the right-holder and the land is terminated through verbal agreement and the provision of compensation to the right-holder, and through which the said land becomes State land.⁴² The release of rights in land is conducted pursuant to the Basic Agrarian Law (BAL/*Undang-Undang Pokok Agraria* or UUPA), including Article 27 which stipulates that the right of ownership is extinguished when:

- a. the land transfer to the State is carried out on the following grounds:
 1. due to revocation pursuant to Article 18;⁴³
 2. due to voluntary release by the right-holder;
 3. due to abandonment;
 4. due to Article 21 point (3)⁴⁴ and 26 point (2).⁴⁵
- b. the land is destroyed.

Furthermore, according to Ari Sukanti Hutagalung, the release of rights requires agreement over a) the release of rights in land and b) the amount of compensation to be paid to the right-holder of the land in question. Thus, both the process of agreement and its substance are highly important, and communities should be involved in both. It is evident that in the case of PT BNM, the release of rights to land was carried out in breach of the fundamental principles of contractual agreement.

Principles of contractual agreement

The basic principles of contract are defined in the Civil Law Code (*Kitab Undang-Undang Hukum/KUHPerdata* (Civil Law Code) which contains at least five principles required to make contractual agreement: freedom of contract; consensualism; legal certainty (*pacta sunt servanda*); good faith and personality.

Freedom of contract: Anyone can freely enter a contractual agreement as long as it fulfils the requirements of the legal contract and does not violate laws, norms and public order (eg pornography, riot provocation). According to Article 1338 section (1) of KUH Perdata, 'All legal agreement is concluded as law for those who enter it.'

Legal certainty (*Pacta sunt servanda*): If a dispute occurs during the implementation of an agreement, for example, if one party breaks the premises (*wanprestasi*) of the agreement, a judge's decision can force the violating party to carry out their obligations as stipulated in the agreement, or can order the violating party to pay indemnities. The court decision is a guarantee whereas rights

and obligations between parties in the agreement have legal certainty and protections.

Consensualism: The principle of consensualism means agreement based on consensus is achieved the moment words of agreement have been spoken, and does not require any further formalities, such as a notary act.

Principle of good faith (*tegoeder trouw*): Good faith requires that the parties entering an agreement maintain an honest, open and trustful attitude to one another, free of ulterior motives or deceit.

Principle of personality: The principle of personality means that the content of an agreement is only binding on the parties who have entered the agreement. It does not bind other parties who withhold their agreement, or individuals claiming to represent the person entering the agreement.

Source: Legal Akses (nd) *Asas-asas Perjanjian. (Fundamentals of Contract)*
<http://legalakses.com/asas-asas-perjanjian/>.

Analysis of company compliance with FPIC and the RSPO standard

Ketapang district policy and regulation favouring private interests

Ketapang district has in place a set of local regulations on Plantation Business Licensing and Partnership, the establishment of TP3K, the Task Force and the Decree on Compensation for Planted Crops which technically regulate the terms and conditions of land acquisition, the licensing process and plantation and mill operations. However, the State's obligation to give full and effective recognition to the existence of the structure, rules and institutions of indigenous peoples, as mandated by law, as long as they still exist

and are in accordance with national interests and the unitary state of Indonesia, has never yet been taken seriously into consideration by the government of Ketapang district. While the governments of Ketapang district and West Kalimantan province both acknowledge the problems of recognition of rights and land disputes in the palm oil sector, they have never fully considered the rulings of the Indonesian Constitutional Court in relation to the Plantation Law, the recommendations of the CERD Committee or other international laws to which Indonesia is a party. Yet this is critical to ensure that the constitutional rights of indigenous peoples and local communities are not eroded and that they are protected from forced evictions resulting from oil palm development.

Transparency and disclosure of RSPO information

According to the RSPO Principle on Transparency, all relevant legal, social and environmental information including the RSPO standards should be accessible to interested stakeholders, with the exception of confidential commercial and private information. The fact that PT BNM accepted to be interviewed by the NGO consortium testifies to their compliance with this requirement, however the researchers were unable to access key documents such as the High Conservation Value Assessment (HCVA) and the Standard Operational Procedure (SOP) on conflict resolution mechanisms, reportedly due to lack of authority from the company representatives interviewed to provide these materials. They were, however, able to obtain copies of the AMDAL assessment reports from the AMDAL Commission in Pontianak, but only six months after first requesting them. Other documents that could not be obtained were copies of the permits, such as *izin lokasi* and IUP, which were reportedly only accessible with approval from the headquarters in Jakarta, but the NGO consortium was unable to obtain these. It was reported that a fire in one of the company's estate offices had destroyed key documents and archival material related to the operations of the company.

Social and Environmental Impacts Assessments

The RSPO standards require an assessment of the social and environmental impacts of planned operations, conducted by an independent third party with the active and direct engagement of affected local communities and other concerned stakeholders. Although an AMDAL is a minimum requirement to put forward an *izin lokasi* for oil palm plantations, PT BNM had already begun clearing land belonging to local people who were willing to cooperate with and give away their lands to PT BNM prior to the AMDAL. In 2008,



■ Interview with PT BNM field office staff / Norman Jiwan

one year after the expiry of PT BNM's first three-year *izin lokasi* (valid from 2004 to 2007), the company obtained an extension, meaning it was effectively operating illegally for one year. No AMDAL study was carried out prior to the first and extended *izin lokasi*.

Complaints were reported by community representatives on the destruction of rivers and creeks as well the pollution of water due to erosion and sediment build-up. Community representatives also complained that they were never involved in the assessment on the impacts of oil palm plantations, either by hired consultants or PT BNM. For a genuine and robust process of respecting the right to FPIC, is it essential that all dimensions of the proposed project be explained thoroughly and this information disseminated widely. Balanced consultations appear to have been absent or disregarded by the company, with *sosialisasi* essentially consisting of the company informing the community of its plans, rather than seeking their consent to these plans. There is no evidence that the company informed the communities of the scale and duration of the project, the purpose of the project, the areas that would be affected by the project, the potential economic, social, cultural and environmental risks and benefits, employment opportunities for local communities, or procedures that the project could entail, such as an SOP or mechanisms for conflict resolution.

■ *Statement of land release by landowners in the PT BNM land acquisition*

PT. BANGUN NUSA MANDIRI
ESTATE GABARI

SURAT PERNYATAAN

Saya yang bertanda tangan dibawah ini

Nama	L. NUS, NARA TRAKU
Tempat/Tgl Lahir	Marabou, 05-11-87
Jenis Kelamin	Laki Laki
Alamat	K. KUBU RINGIN
RT/RW	1/1
Desa	Pekalongan
Kec.	St. Jula
Kab/Kota	Kepulauan Kelapang
Agama	Kesult
Pekerjaan	Wali (Gr. SW & Rm)

Dengan ini telah menyerahkan surat tanah ke PT. Bangun Nusa Mandiri, Estate Gabari, yang bergerak di bidang Perkotaan Kelapa Sawit.

Surat tanah yang diserahkan seluruh (100%) yang diserahkan dengan

Timur Berbatasan	KUBU RINGIN
Barat Berbatasan	Gr. 10
Utara Berbatasan	Gr. 10
Selatan Berbatasan	SW & Rm

Apabila telah diserahkan surat tanah ke PT. Bangun Nusa Mandiri, Estate Gabari, ada terjadi sengketa, insiden, Permusatan di lingkungan di sekitar tanah yang diserahkan dan diganti rugi (GR) oleh yang bersangkutan yang merupakan tenaga diatas Surat Pernyataan ini, maka saya bersedia untuk menyelesaikan sengketa tersebut dan pihak PT. Bangun Nusa Mandiri, Estate Gabari.

Apabila saya tidak bisa menyelesaikan, maka saya dituntut ke pihak yang bersedia (Kepolisian), atau Pengadilan Negeri Kelapang di Kelapang

Demi ini Surat Pernyataan ini saya buat, untuk dapat digunakan sebagaimana mestinya

Diketahui,

Baki

Dituj 27-7-18

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According to the PT BNM Document and License team, the company does not have any documentation on the social impacts of its operations. An HCV assessment was conducted by a hired consultant from the Bogor Institute of Agriculture (IPB). 15% of PT BNM's concession was identified as HCV and has been conserved by Sinar Mas Agro Resources and Technology (SMART).⁴⁷ No peatland or orang-utan habitats were identified in the assessment. As part of the Annual Progress Report of the RSPO on GAR, the company states that it 'promote[s] deforestation-free palm oil through our collaboration with TFT [The Forest Trust]'.⁴⁸

Although the company states that the HCVA consultant carried out consultations and explained the concept of HCV to local communities, community members interviewed by the NGO consortium in the field felt that they had never been engaged in the HCV assessment, that very little was explained to them about why HCV signboards had been put up on their community lands in particular, and that they did not know the purpose and function HCV areas. The communities appear not to have been informed of the total area of HCVs in the PT BNM concession. The location, types and condition of the 15% of land identified as HCV are not specified, and neither is the way in which the access and rights of local communities to these HCVs are affected. Community members



■ HCV 1.1 in PT BNM concession / Norman Jiwan

from Silat Hulu were reportedly never consulted in relation to where HCVs were located on their customary land. Instead, the signboards went up without their knowledge, and on lands that they never agreed to relinquish. Some community members also noted that the company continued to clear upstream areas, thereby polluting water resources and cutting off the community's access to this basic source of subsistence. One of their greater concerns is that these pressures and negative impacts are not only coming from PT BNM but also from several other current and prospective plantation and mining investors active (or soon to be active) in neighbouring areas.

Dispute handling and customary land rights recognition

Point 6 of the GAR Social and Community Engagement Policy (SCEP) on the Responsible Resolution of Conflicts states the GAR's commitment to 'actively promoting and supporting the responsible resolution of any conflicts involving GAR operations'. This includes 'working with relevant stakeholders to ensure that conflicts are resolved through a process that is agreed upon by all relevant parties involved, respects customary and individual rights,

and ensures the free prior and informed consent of relevant stakeholders to any resolution agreements.' GAR also commits to doing its best to 'prevent any use of force which could unnecessarily lead to violence'.

The district government-established TP3K and SATGAS/SATLAK to function as intermediaries between the company and local communities in land-related disputes, but their structure and composition is determined solely by district and sub-district authorities and the oil palm plantation company. Concerned and affected local people do not feature in these structures, and thus their interests, needs and endorsement of these mechanisms are lacking. Approaches adopted by the SATGAS and SATLAK in terms of land acquisition include communicating with interested and influential local leaders, usually on an individual basis and without involving the wider community in the decision-making process. There is serious doubt as to whether the interests of these communities can be adequately represented by proxies and sometimes even leaders with vested interests.

Furthermore, the Conflict Resolution Process (CRP) developed by GAR has not been implemented by PT BNM. As a result, it is impossible to tell if and to what extent conflict resolution is effective. In the case of Silat Hulu, it was reported that the company had never implemented the CRP and that instead PT BNM had engaged the district and sub-district police, the sub-district customary council and district apparatus. Moreover, company representatives interviewed stated that they did not have any specific procedure in place to deal with disputes, relying largely on oral and ad hoc intervention, with little recorded or written documentation of these processes.

FPIC in consultation and socialisation

In line with its Forest Conservation Policy (FCP), GAR has committed to respect and recognise customary rights and individual

user rights of indigenous communities and local communities in their territories. This process requires:

- (1) Participatory mapping of all indigenous and local community lands prior to negotiation
- (2) Social Impact Assessments carried out in a participatory manner, the results of which will be publicly available and actively shared with relevant stakeholders
- (3) Open negotiation processes and
- (4) Documented agreements signed by all relevant parties.⁴⁹

The NGO consortium, however, found no evidence of participatory maps of community lands in the land acquisition realisation plan of the company. Nor were copies of negotiated agreements seen detailing the permit acquisition process. Several community members do not have copies of land release agreements they have signed, and yet in PT BNM's documentation, it is stated that community members who agreed to give away their lands are bound by certain obligations, such as to be held accountable and be prepared to solve any arising problems of claims and disputes on the said lands by other parties without engaging the company. This tactic creates inter- and intra-community division and a breakdown in social cohesion and harmony. By transferring these responsibilities to the community members themselves, the company frees itself from having to deal with overlapping claims and rights.

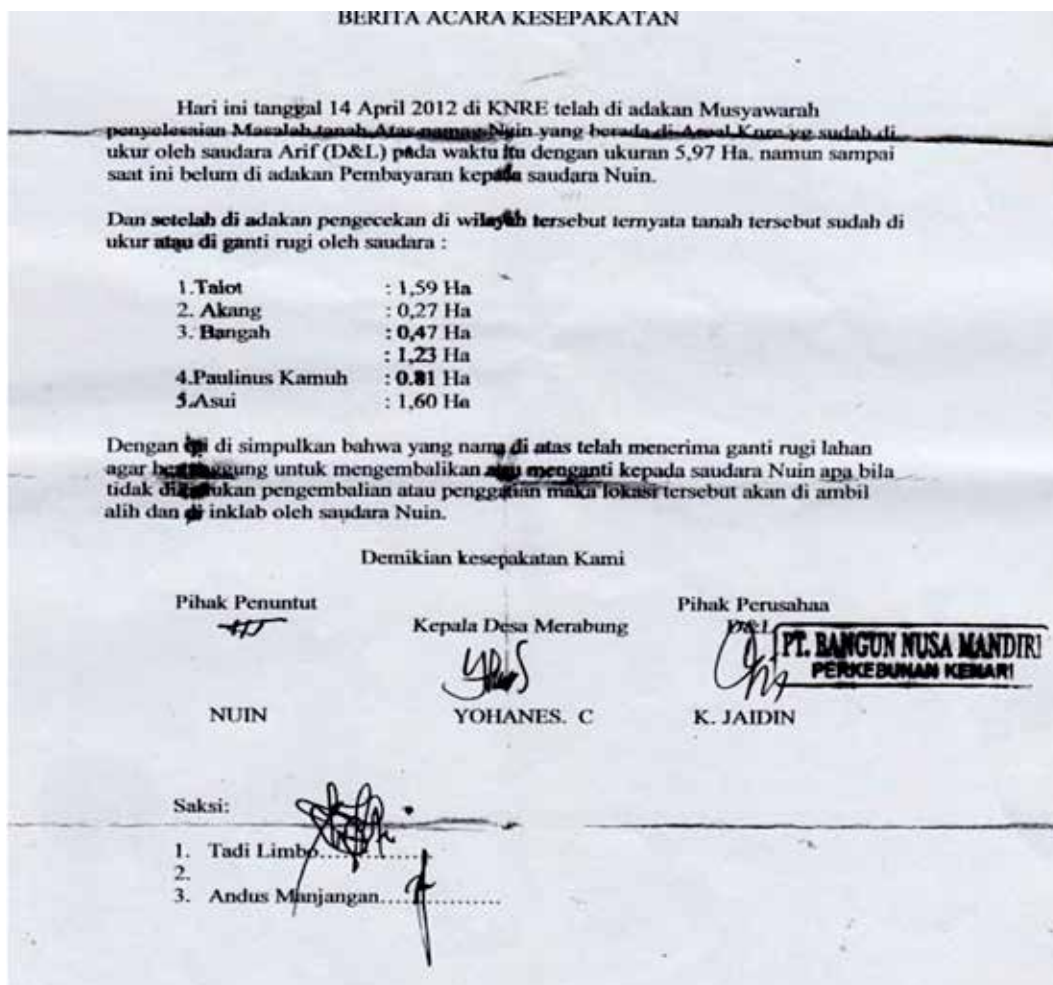
Ideally, the local communities would have been represented in interactions with the company by institutions and representatives of their own choice through their own customary election process, in transparent and open communication with other community members. The proxy representation of SATGAS and SATLAK under TP3K undermines this right and instead plays in the interests of the company and government. There is also little evidence that the communities were informed of their right to seek independent third party legal support if they felt this was necessary. *Sosialisasi* appears to have been

rushed and far from a two-way iterative negotiation on even bargaining grounds between the company and the communities. The land release statements, which should have developed through negotiation, dialogue and a consensual process (*musyawarah dan mufakat*) binding on all parties and enforceable in court, was in fact concluded unilaterally with obligations placed on the community members but no binding implications on the company. Whether the long term implications of land release by community members were fully and objectively explained prior to signing the agreements is also highly uncertain.

Community members interviewed repeatedly complained that to date PT BNM had not taken responsible measures to resolve the issues of forced evictions, lost land and damaged crops, despite several attempts by the communities to engage the company in discussion over these matters. Despite these unresolved matters, some SMART/GAR holdings have been partially certified, in contradiction to the Certification Systems whereby the issuance of certificate can be awarded and continued only when land disputes have been properly resolved through a mutually agreed process.⁵⁰

Due compensation

PT BNM carries out a written compensation process following the regulations of the Ketapang district government and conducted by SATGAS, SATLAK and the PT BNM field land acquisition team. The payment of compensation in general is made in cash to every entitled individual or representative of the landowners. However, the findings of the NGO consortium team suggest that compensation payment excluded the direct and indirect impacts of land clearing such as the degradation of clean water resources, the damage of small rivers and creeks, and in particular, the eviction of the local communities of Silat Hulu from their customary lands. The compensation process is highly selective, with those community members giving



away their land receiving payment, and those who refuse to give away their lands not receiving any form of compensation even though their lands, forests and crops have equally been cleared to make way for oil palm. Although PT BNM keeps records of the identification of land rights by engaging the relevant government institutions, the legal and customary rights of the land-owners are not taken into account. Furthermore, it appears that on a number of occasions, the company paid compensation to the wrong individuals, as a result of having failed to accurately map out customary rights to land and customary boundaries. In addition, some community members gave away their land in the expectation of benefits such as partnership schemes, yet the terms of these partnerships remain highly opaque, causing tensions and discontent among the communities. All these matters remain difficult to verify as the processes of compensation and partnerships are not documented or

■ *Examples of proxy settlements where compensation was paid to the wrong individuals*

publicly available, and because copies of important documents such as the AMDAL and HCVA could not be accessed during the field investigation. The NGO consortium wrote to the Provincial Crop Estates Office in Pontianak requesting copies of these documents but no response was received.

Social welfare

Community representatives reported that during *sosialisasi*, PT BNM made a number of promises to the communities relating to their social welfare, including: offering employment, opening connecting roads and improving village infrastructures, setting up water pipes and clean water facilities, and building a clinic and community health centre. Yet field investigations reveal that

communities are complaining of polluted upstream rivers and damaged creeks and watersheds as a result of land clearing and preparation. It would thus appear that the company has failed to take measures to prevent, mitigate and remedy these negative impacts. Instead of promoting social welfare, the 'divide and rule' tactics being used to acquire land, and the destruction of customary sites of cultural importance, such as graveyards, are contributing to the erosion of social values and norms, as well as in direct contravention to the HCV requirements of the RSPO Principles & Criteria.

Partnership scheme under the one-roof management system

Community members who gave away their lands to PT BNM were promised plasma in the form of oil palm plots⁵¹ in a partnership scheme known as the one-roof management system, where all plasma is managed by a nuclear plantation. The scheme requires that both nucleus and plasma plantations be legally under HGU titles managed by the company.⁵² The benefit sharing arrangement is based on an 80:20 ratio (for example, 2,000 ha of plasma would be received where 10,000 ha were released). PT BNM and the chair of the local cooperative stated that plasma plantations would be managed by the cooperative and that cooperative members would receive their shares of the profit on a monthly basis. According to these representatives, the technical aspects of the partnership and its operations are the responsibility of the cooperative, yet the RSPO standard requires that the RSPO member company itself takes responsibility to assess impacts and develops plans and arrangements for sustainable local development and economically viable smallholding schemes. Although individual or outgrower oil palm smallholders are not required to conduct formal impact assessments, if they are supplying FFB to the company's processing mill then the company should consider the impacts of the smallholders and ensure appropriate mitigation measures are in place (criteria 6.1).

Certification programme and credibility of the company as RSPO member in relation to land disputes in Silat Hulu

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In line with its obligations as an RSPO member and the requirements for Partial Certification, GAR/SMART has developed a Time Bound Plan (TBP) for RSPO certification, aiming for certification of all plantations and mills (and including FFB suppliers) by 2015. Certification bodies and auditors as well as assessors have to verify regularly whether the uncertified sister plantations and mills with holdings of more than 51% comply with the Partial Certification requirements, and this includes PT BNM's resolution of labour disputes, land conflicts, and identified legal non-compliance. Yet neither GAR nor SMART representatives have made official statements relating to the legal compliance of PT BNM, or the land dispute with Silat Hulu hamlet and other communities, whereas these communities still contest the land clearing and unauthorised activities of the company on the ground. It is critical that auditors and certification bodies (CBs) provide an objective evaluation through participatory field investigations with the affected communities. Failing to do so puts the credibility and accountability of the auditors, the CBs, and the RSPO itself in doubt.⁵³

Recommendations

Recommendations from local communities

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Recommendations from the local communities of Pring Kunyit, Silat Hulu, Riam and other affected communities in the PT BNM concession that we interviewed were as follow:

- Mitigation of land clearing impacts on water resources by providing clean water facilities such as pipe lines and stopping conversions of upstream creeks and catchment areas.
- Provision and realisation of promised facilities and infrastructures including roads.
- Information sharing by the company

on the legal status of its operations, the lease agreement and duration and the legal status of the land within the concession after the expiry of the lease.

- Socialisation on the meaning and purpose of HCVs to local communities, as well as joint identification of further HCV sites considered by the communities as of high cultural and social value (including graves and sacred trees).
- Resolution of all ongoing land conflicts, including but not limited to the cases of community members of Silat Hulu.
- Implementation of the 80:20 plasma scheme with due *sosialisasi* by the company on its implications, terms and conditions to community members interested in joining the scheme.
- Access to all relevant documents by community members, including HCVA, SIA, information on the company's acquired *Izin Lokasi*, *Izin Usaha Perkebunan*, AMDAL and available maps.

Recommendations from government bodies

The main recommendation from the government representatives interviewed (National Land Agency Office and Plantations Office of Ketapang District) was for the roles, responsibilities and authority of each institution to be clarified with regards

to dispute resolution and the securing of land rights in oil palm investments and operations. The Ketapang district government informed the NGO consortium that it was working closely with an association of the Indonesian district governments (*Apkasi*) to deliberate and promote a proposal on the impacts and benefits of oil palm investments and operations in their areas. A former Ketapang district and now provincial parliament member also recommended that Ketapang district impose a moratorium on issuing new permits and review existing permits pending resolution of land conflicts and further information-sharing with affected local communities.

Recommendations from PT BNM

PT BNM staff acknowledged that they still face problems in terms of how to conduct land acquisition processes which actively involve local communities, and welcome interested parties to help identify better ways of engaging in dialogue and negotiation with communities. The company staff also questioned how HCVs were to be secured when these are found within the customary lands claimed by communities, and what needs to be done where community members want to

■ *Research team in Ketapang / Andiko Sutan Mancayo*



sell or surrender these areas. Finally, PT BNM staff admitted that the company was in serious need for effective ways of resolving disputes and claims over lands, which to date is hampered by the fact that the company does not have in place a specific and dedicated conflict resolution mechanism to deal with land disputes.

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Appendix: The Ruling of the Constitutional Court of the Republic of Indonesia⁵⁴

Confirmation of the Constitutional Rights and Interests of the Indigenous Peoples of Silat Hulu

Introduction to the ruling of the Constitutional Court

One of the purposes of the establishment of this country is to promote general welfare, as stated in the fourth paragraph of the Preamble of the 1945 Constitution. Nevertheless, it appears that this goal is still far from being realised. In particular, the promulgation of Law No. 18 of 2004 on Plantations (hereinafter referred to as Law No. 18/2004) has led to much misery for most farmers in areas where plantations are in operation.

The Government of Indonesia originally considered the passage of Law No.18/2004 on Plantations as the legal basis for developing plantations for the greater welfare of the Indonesian people, in line with the mandate and spirit of Article 33 paragraph (3) of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the 1945 Constitution) which states that the earth and water as well as the natural riches contained therein shall be controlled by the State and used for the greatest prosperity of the people.

In order to support and promote the plantation sector as one of pillars of the development and improvement of the national economy, the government has made various efforts that facilitate increased capital investment in the plantation sector, such as through the issuance of pro-investment policies and the provision of adequate land for plantations.

Unfortunately, the goodwill of the government to promote economic development is not accompanied by adequate supervision on the practices of plantation companies in managing their plantation operations, which often violate laws and abuse human rights, especially those of peasants and indigenous peoples living in and around the plantations.

Law enforcement officers are often insensitive to the problems faced by rural communities and farmers around these plantations. Conflicts over land between local people and farmers and plan-

tation companies are often followed by arrests and detentions, and even the suing of community members. Inequalities in terms of ownership, control, and management of natural resources place the defendants at a serious disadvantage. The criminalisation of local communities and farmers is widespread across Sumatra, Sulawesi, Kalimantan and other regions of Indonesia.

In this context, Law 18/2004 opens up space for sustained large-scale land exploitation by plantation operators and consequently exacerbates local communities' dependency on these plantations. The lack of regulations on the maximum and minimum size of land that can be cultivated as a plantation eventually leads to the excessive concentration of long-term land use rights (HGU) in the hands of the private sector. As a consequence, of indigenous peoples and farmers living in and around the plantation concessions will be gradually displaced and will lose access to the ancestral lands they have owned, used and managed for generations.

The Plantation Law is thus largely geared towards benefiting the private sector and recognition of indigenous land rights requires that indigenous law communities (*masyarakat hokum adat*) provide concrete evidence that these rights still exist. As stated in the General Explanation of Law No.18/2004 paragraph 7:

The granting of land rights to the plantation business should take into account customary land rights of indigenous peoples, *as long as they still exist and do not conflict with the higher laws and national interests*. In addition, to ensure fairer ownership, control, use and equitable utilisation of land, it is necessary to set the maximum and minimum limit sizes of land for plantation operations.' (emphasis added)

In the light of this Explanation, it can be argued that the plantation development under the Plantation Law benefits private national and foreign entities as well as State Owned Enterprises rather than the people of Indonesia or the communities directly affected by plantation development.

Furthermore, the administrative and criminal sanctions imposed against any person who

commits acts prohibited by the Plantation Act is another prevalent problem which requires immediate resolution. The problem arises from the fact that the charges for 'a ban on an act' as stipulated in Articles 21 and 47 of the Plantation Law are vaguely formulated with insufficient detail, leading to the danger that these clauses may be abused and misused.

We, the Petitioners, do not deny that the Plantation Act is aimed towards the equitable welfare and prosperity of the people. However, if there is evidence that this Act is being manipulated by companies and authorities in their own interests, we firmly sustain our rejection of Articles 21 and 47 of Law No.18/2004.

The legal standing and constitutional interests of Japin and Vitalis Andi

That the recognition of the right of every Indonesian citizen to file a petition against any law that contradicts the 1945 Constitution is a positive indicator of constitutional development which reflects the progressive realisation to the strengthening of the principles of the rule of law;

That the Constitutional Court, among other mechanisms, has as its main function to serve as a 'guardian' of the 'constitutional rights' of every citizen of the Republic of Indonesia. The Constitutional Court is a judicial body in charge of protecting human rights as constitutional and legal rights of every citizen. With this in mind, the petitioners decided to put forward a judicial review against Article 21 in conjunction with Article 47 of Law No.18/2004 which are in contradiction to the spirit and foundations of relevant provisions contained in the 1945 Constitution;

That Article 51 paragraph (1) of Law No. 24 of 2003 on the Constitutional Court states,

The petitioner(s) is the party that considers their constitutional rights and/or authorities aggrieved by the enactment of the law, namely: (a) an individual citizen of Indonesia, (b) the unity of indigenous peoples as long as they still exist and in accordance with the development of society and the principle of the unitary Republic of Indonesia, which is set by law, (c) public and private legal entity, or (d) of State institutions.

That the applicant of the judicial review is an individual citizen of Indonesia who in fact lives in plantation areas and has lands in proximity of the plantations;

That the Petitioners (indigenous peoples and local community members) are often in conflict with plantation companies located around the area of their own domicile;

That due to some outstanding conflicts between the Petitioners and plantation companies, the Petitioners have been accused and charged under the provisions of Article 21 and in conjunction with Article 47 of Plantation Law No.18/2004;

That Petitioner I (indigenous person), Japin, a customary leader, is a citizen of Indonesia, a community member of Silat Hulu hamlet, Bantan Sari village, Marau sub-district, Ketapang district, West Kalimantan who owns land used by a plantation company (PT Bangun Nusa Mandiri) as plantation land. Petitioner I (Japin), together with other concerned community members have made various efforts to prevent and stop the takeover of their ancestral lands, but to no avail.¹

That in order to demand the return of land tenure rights, Petitioner I has made several efforts to restore his rights to the land, including through amicable dialogue and peaceful demonstrations;

That, having tirelessly carried out efforts to regain his rights over the lands used without his consent by the plantation company, Petitioner I has in fact, or at least potentially has, committed 'actions that results in damage to the plantation and/or other assets, the use of plantation land without permission and/or other actions that may result in disruption of the plantation operations' as stipulated in Article 21 and in conjunction with Article 47 of Law No.18/2004;

That Petitioner II, Vitalis Andi, is a citizen of Indonesia, Secretary General of Aliansi Masyarakat Adat Jelai Kendawangan or the Alliance of Indigenous Peoples of Jelai Kendawangan (AMA-JK) Ketapang. Petitioner II together with the Dayak Jelai indigenous peoples of Silat Hulu, Bantan Sari village, Marau sub-district, Ketapang district, West Kalimantan, actively lead in demanding the

return of lands taken without consent and used as private plantation estates without approval from the concerned communities. Petitioner II together with other community members has made various efforts to prevent and stop the destruction of land and the eviction of indigenous communities in Silat Hulu, either through deliberation, hearings, and direct demands and reports to the local government and the National Human Rights Commission (Komnas HAM), but has always been ignored;

That having tirelessly made many efforts to help indigenous peoples to regain their rights over lands which were being used by the plantation company, Petitioner II factually, or at least potentially has committed 'actions that might result in damages to the plantation and/or other assets, the use of plantation land without permission and/or other actions that might result in disruption of the plantation' as stipulated in Article 21 and in conjunction with Article 47 of Law No.18/2004.

That the provisions of Article 21 and Article 47 of the Plantation Act have resulted in fear and trauma for the petitioners (Vitalis Andi and Japin) in their fight to defend their rights to lands, as they will very likely be charged based on these Articles;

That the provisions of Article 21 and Article 47 of the said Act disturb or at least potentially interfere with the fulfilment of the petitioners' other constitutional rights, especially the right to self-improvement in order to meet their basic needs;

That based on the above mentioned explanation, the Petitioners have legal status (legal standing) as the applicants for Judicial Review as there exists a cause and effect relationship (*causal verband*) with the enactment of Law No.18/2004, which has led to the actual and potential undermining of the constitutional rights of the applicants.

Capacity of the applications to review the law (rights of material review)

That the applicants as part of Indonesian society have the right to recognition, security, protection, and fair legal certainty and equal treatment before the law;

That the applicants are also entitled to develop themselves, in order to fulfil their basic needs, in order to enhance their quality of life and welfare as human beings;

That the applicants are entitled also to have a fulfilled sense of security, to be free from fear, to enjoy all forms of protection as citizens and to be free to act in line with their constitutional rights;

That the applicants in meeting their basic needs, as the main pillar of their constitutional rights, access land as the most important means to develop themselves and their families, and maintain and improve the quality of their life and lives, for the welfare of themselves and their families;

That based on the description above, it is clear the applicants have met the quality and capacity of applicants as 'Indonesian Individual Citizens' in testing the Law through judicial review towards the Constitution of 1945, as provided for in Article 51(c) of Law 24/2003 concerning the Constitutional Court. Therefore, the Petitioners have the right and legal interests to represent the public interest and apply for Judicial Review of Article 21 in conjunction with Article 47 of Law No.18/2004.

The decisions

Hearing, stating:

- To endorse the petition of the applicants;
- Article 21 and its explanation, Article 47 paragraph (1) and paragraph (2) of Law No. 18/2004 on Plantations (State Gazette of the Republic of Indonesia Year 85/2004, Supplement to State Gazette of the Republic of Indonesia Number 4411) *contrary to the Constitution of the Republic of Indonesia 1945*; (emphasis added)
- Article 21 and its explanation, Article 47 paragraph (1) and paragraph (2) of Law No. 18/2004 on Plantations (State Gazette of the Republic of Indonesia Year 85/2004, Supplement to State Gazette of the Republic of Indonesia Number 4411) **does not have binding force**; (emphasis added)
- To order the inclusion of this decision in the Official Gazette of the Republic of Indonesia.

Endnotes

1. Director, Transformasi Untuk Keadilan Indonesia.
2. Director, HuMA, individual member and former board member of Sawit Watch.
3. Director, WALHI Kalimantan Barat, individual member of Sawit Watch.
4. Project staff, Scaling Up Sustainable Palm Oil (SUSPO), Sawit Watch.
5. Deputy Director, WALHI Kalimantan Barat, individual member of Sawit Watch.
6. Pemerintah Kabupaten Ketapang (nd) *Info Daerah*. http://www.humas.ketapang.go.id/info_daerah.php?k=sejarah_ketapang
7. This area includes Teluk Batang, Seponti, Pulau Maya Karimata, Simpang Hilir, Sukadana, Matan Hilir Utara, Delta Pawan, Muara Pawan, Matan Hilir Selatan, Benua Kayong, Kendawangan and Manis Mata.
8. This area includes Simpang Hulu, Simpang Dua, Sungai Laur, Sandai, Hulu Sungai, Nanga Tayap, Tumbang Titi, Pemahan, Sungai Melayu Rayak, Jelai Hulu, Marau, Singkup and Air Upas sub-districts.
9. Frans, L 2010:59.
10. *Daftar Proyek Koridor Ekonomi Kalimantan Yang Sudah Disetujui KP3EI Pusat*. <http://www.docstoc.com/docs/126979659/Lampiran-3d---IDENTIFIKASI-PROJECT-MP3EI-KALIMANTAN-BARAT-1>. On MP3EI, see Kementerian Koordinator Bidang Perekonomian 2011.
11. Milieu Defensie & Walhi Kalbar 2009.
12. Carlson et al. 2012. See also Forest Climate Center 2012.
13. A private plantation is a plantation without plasma. This scheme was applicable prior to the passing of Permentan No.26/2007.
14. Regions of category 3 are designated for plantation development activities including oil palm plantations.
15. This consists of an honorarium or commission fee from the land transaction which is awarded to the head of the sub-district (1.5% of the total compensation monies paid by the company), the village head (1%) and the head of hamlet (0.75%).
16. Kalbarprov.go.id 2008.
17. Singapore Exchange 2011.
18. SMART TBK 2011:2.
19. Indonesia Stock Exchange 2010.
20. Greenpeace 2008; Greenpeace 2009.
21. This represents an expansion of 9,283 ha since 2008, when the company's total landholding was of 128,817 ha. See SMART TBK (nd).
22. SMART TBK 2011.
23. Full SCEP available at SMART TBK 2011b.
24. Diagram presented by GAR at the FAO regional expert meeting, January 2012, Bangkok. The diagram is not available online.
25. Golden Agri-Resources 2012.
26. Surat Permohonan PT Bangun Nusa Mandiri, 7th December 2004, Nomor: 03/BNM-KTPE/D&L-6/JKTO/XII/2004.
27. The Bupati Decree does not make reference to Law Number 18 of 2004 on Plantations, which was passed and effectively in place on 11th August 2004.
28. Points 3, 6 and 17 of Keputusan Bupati Ketapang Nomor 387 Tahun 2004 tentang Pemberian Izin Lokasi Untuk Keperluan Pembangunan Perkebunan Kelapa Sawit atas Nama PT Bangun Nusa Mandiri.
29. Keputusan Bupati Ketapang Nomor 31 Tahun 2008 tentang Perpanjangan Izin Lokasi Perkebunan Kelapa Sawit atas Nama PT Bangun Nusa Mandiri.
30. Surat Permohonan PT Bangun Nusa Mandiri Nomor 06/BNML-KTPE/D&L7/JKTO/IX/07 Perihal Permohonan Perpanjangan Izin Lokasi Perkebunan Kelapa Sawit.
31. Keputusan Bupati Ketapang Nomor 489 Tahun 2008 tentang Perpanjangan Izin Lokasi Pembangunan Perkebunan Kelapa Sawit dan Pabrik Pengolahan atas Nama PT Bangun Nusa Mandiri, 22nd December 2008.
32. Surat Permohonan PT Bangun Nusa Mandiri Nomor 13/D&L7/JKTO/XI/08, dated 27th November 2008.
33. Keputusan Bupati Ketapang Nomor 329 Tahun 2008 tentang Perubahan atas Keputusan Bupati Ketapang Nomor 31 Tahun 2008 tentang Perpanjangan Izin Lokasi Pembangunan Perkebunan Kelapa Sawit atas nama PT Bangun Nusa Mandiri.
34. Aliansi Masyarakat Adat Jelai Kendawangan (nd).
35. Notes of *sosialisasi* of PT BNM with Lubuk Durian hamlet, Sengkuang village, Air Upas sub-district, 8th March 2012. See also Surat Permohonan Latret Jalan Dusun Sentaman, Desa Sengkuang Merabung, Kecamatan Manis Mata, 6th February 2012.
36. Frans 2010:59.
37. Ibid:61.
38. This and the following sections draw from direct testimonies of community representatives interviewed by the NGO consortium in Silat Hulu. See also Perkara Pidana 2010.
39. Common to most Dayak peoples, including the Jelai, is the notion that where disputes have been resolved in a mutually respectful manner and with the necessary rituals, there are no outstanding resentments or need for vengeance. If, however, the disputes reoccur, sanctions and charges may double or triple, sometimes requiring the expulsion of responsible parties from the hamlet and prohibitions on any activity by these individuals within the ancestral and customary territories.
40. The provision of compensation for planted crops is legalised in various national and local level policies. See *Regent Regulation 6 of 2006*

on Peraturan Bupati Nomor 6 Tahun 2006 on Planted Crop Compensation in Ketapang District (Peraturan Bupati Nomor 6 Tahun 2006 tentang Pengaturan Harga Dasar Ganti Rugi Tanam Tumbuh di Kabupaten Ketapang).

41. 1945 Constitution of the Republic of Indonesia.
42. Statement by Hutagalung, 2007.
43. Article 18 stipulates that 'In the public interest, including the interests of the Nation and State as well as the common interest of the people, the rights on land may be annulled, with due compensation and according to a procedure laid down by act.'
44. Article 21 point 3 stipulates that 'Any foreigner, who after the coming into force of this Act has obtained the right of ownership through inheritance, without a will or through communal marital property and any Indonesian citizen too, having the right of ownership and losing nationality after the coming into force of this law, are obliged to relinquish that right within a period of one year after the obtaining of that right or after losing that nationality. If after the expiry of that period the right of ownership is not relinquished, then it becomes invalid by the provision that the right of other parties, incumbent hereon, endure.'
45. Article 26 point 2 stipulates that 'Each sale and purchase, exchange, gift, bequest by will and other acts which are meant to transfer the right of ownership directly or indirectly to a foreign, to a national possessing a foreign nationality in addition to his/her Indonesian nationality, or to a corporation, except those which have been by the Government as meant in Article 21, clause (2) are not valid by law the provision that rights of another party incumbent therein remain valid and that all payments which have been received by the owner may not be reclaimed.'
46. The head of the cooperative, Pak Loren, showed the NGO consortium certain (confidential) documents on the incorporation of the cooperative but lacked information as to the terms and conditions of the plasma scheme arrangement.
47. SMART TBK 2010: 2.
48. Roundtable on Sustainable Palm Oil 2012: 53.
49. See Social and Community Engagement Programme (SCEP) at <http://www.smart-tbk.com/pdfs/Announcements/111110%20Press%20Release%20->
50. Roundtable on Sustainable Palm Oil 2007
51. Some studies have documented the detrimental impacts and failures of smallholder schemes in Ketapang district, in particular, the KKPA (*Koperasi Kredit Primer Anggota*/Primary Co-operative Credit for Members) and PIR-Trans (*Perkebunan Inti Rakyat Transmigrasi*/Transmigration Nucleus Estate Scheme) models. See for example Soetarto et al. 2001 and Walhi Kalbar & Down to Earth 2000.
52. Interview with head of Ketapang district Plantation Office.
53. Golden Agri-Resources (nd)
54. Adapted from ELSAM 2010a
55. See evidence P-2 of the Judicial Review recorded in the Constitutional Court Ruling number 55/PUU-VIII/2010.

7 Update on IFC CAO mediation in PT Asiatic Persada (Jambi, Indonesia)

Sophie Chao

Complaints against Wilmar oil palm concession PT Asiatic Persada (Jambi, Sumatra) were submitted in 2006 and 2008¹ to the Compliance/Advisor Ombudsman (CAO) of the International Finance Corporation (IFC) and to the Roundtable on Sustainable Palm Oil (RSPO) about the social and environmental problems associated with subsidiary companies of the Wilmar Group.² In 2011 an independent investigation into human rights abuses and land conflicts in this concession was conducted by organisations that were signatories to these complaints, leading to a third complaint submitted to the IFC CAO in 2011.³ Having been deemed eligible for further assessment by the CAO,⁴ this complaint led to the formation of a Joint Mediation Team (JOMED) between the IFC CAO and the provincial government of Jambi to resolve ongoing land conflicts in the concession with the indigenous Batin Sembilan communities of six villages: Mat Ukup, Terawang, Pinang Tinggi, Sungai Beruang, KopSad and Kelompok Bidin. Mediation began in these villages in 2012.

On 19th – 24th April 2013, Sawit Watch, Forest Peoples Programme and Setara Jambi (signatories to all three complaints to the IFC CAO) visited PT Asiatic Persada to assess progress in IFC CAO mediation of land conflicts in these villages. The team also interviewed relevant local NGOs (Perkumpulan Hijau and CAPP) and the IFC CAO mediators. The company did not respond to the team's request to meet.

The findings of the investigation revealed that two villages had chosen to no longer participate in the CAO mediation process (Terawang and Mat Ukup), while four

other villages were still engaged (Sungai Beruang, Pinang Tinggi, Kopsad and Kelompok Bidin). Tempers were high in some communities and fluctuating between frustration, anger and a sense of resignation. All communities noted that the mediation process was a drain on their time, energy and resources. The communities also expressed concerns over procedural issues in the mediation, including lack of structure, sufficient information-sharing and communication between the parties and the Joint Mediation Team, leading to perceptions of the CAO as passive rather than neutral, and of the government representatives in the mediation team as weak and inefficient. However, the research team also found that while progress in the mediation in all villages was slow and tangible outcomes have yet to be achieved, at least two of these communities (Sungai Beruang and Pinang Tinggi) saw great value in the IFC CAO mediation process, which they wished to see continued and improved.

Of greatest concern to the communities were rumours that PT Asiatic Persada had been sold off by Wilmar to non-Wilmar, non-RSPO and non-IFC funded companies in the course of April 2013, with no prior consultation or information-sharing to the communities or signatories of the complaint, and while CAO mediation was still ongoing. This generated tremendous tension and anxiety among the communities still involved in the CAO mediation process who feared that all progress made through these mediations would now be lost, with no guarantee that the new management would want to continue mediation, either through or outside the CAO.

Upon request of the complaint signatories in May 2013, Wilmar confirmed that it had signed an agreement to sell PT Asiatic Persada to Prima Fortune International Ltd and PT Agro Mandiri Semesta and that as of 1 April 2013, Wilmar had handed over management of the property to the Buyers. A notice had been posted in local Indonesian newspaper Sinar Harapan on 23rd March 2013, requesting creditors to contact Wilmar with any objections within two weeks.

On 6th May 2013, a meeting was held at the Governor's Office in Jambi with JOMED, the mediation observers and complaint co-signatories (although not all of them were invited to attend), and local community members (upon the initiative of the co-signatories, as they were not invited to this meeting), to discuss the implications of the handover of PT Asiatic Persada to other parties in relation to the ongoing mediation process. In this meeting, all parties present agreed that the Joint Team Mediation should continue the mediation process as well as pursue implementation of several agreements already reached with parties involved in this process. The participants also agreed that Wilmar, as the former owner of PT Asiatic Persada, still bore the responsibility to ensure that agreements made were kept and implemented as required.

Upon request of the affected local communities, a complaint was sent to Wilmar Group on 14th May 2013 on lack of transparency and information prior to the handover of the concession, demanding clarification on, inter alia, why no information had been shared with the parties involved in the ongoing mediation, and what responsibility Wilmar itself would take to ensure that the resolution of conflicts in PT Asiatic Persada was achieved.⁵

The perfunctory nature of Wilmar's response⁶ to the complaint failed to demonstrate awareness and concern for the livelihoods and rights of the affected communities, which have been deeply

affected by Wilmar's operations. The response made no reference at all to the affected local communities, raising serious doubts as to whether Wilmar has any sense of responsibility or commitment towards resolving the conflicts of its own operations and the well-documented and publicised human rights abuses relating to PT Asiatic Persada, prompting a renewed complaint from the signatories on 7th June 2013.⁷

On 4th July 2012, Forest Peoples Programme, Sawit Watch and Setara Jambi wrote to the IFC seeking formal clarification about the procedures and agreements it has in place when client companies that are in active relations with IFC unilaterally divest themselves of holdings.⁸ The letter noted that the case of PT Asiatic Persada raises serious questions about the accountability of IFC clients to adhere to the IFC's Performance Standards. If IFC clients can evade their responsibilities simply by selling operations where they get caught out for violations, the whole Performance Standard system for risk avoidance is placed in jeopardy. The IFC acknowledged receipt of this letter but no response was provided. Also unclarified at the time of writing were the outcomes of the first meeting between the IFC CAO and the new management of PT Asiatic Persada, which would determine whether mediation by the CAO would continue.⁹

The handover also highlights a critical weakness of the RSPO: the absence of criteria or guidance related to the obligations of RSPO member companies where concessions are sold to non-RSPO companies, particularly where conflicts and conflict resolution processes are still underway. At the time of writing, this issue had been communicated to the RSPO as needing to be addressed urgently as part of systemic reform of the RSPO mechanism. The Wilmar case has led the IFC to clarify that the IFC Performance Standards apply to the full 'supply chain' from producer to retail (for all commodities and not just palm oil).¹⁰ Accordingly, the new IFC Strategy for the palm oil sector requires clients to

carry out a detailed assessment of their suppliers, develop a purchasing policy and adopt management and monitoring systems to ensure compliance with these standards and progressively effect a transition towards the purchase of oils which are produced in compliance with the RSPO standard or equivalent. Over the past six years, FPP have been persistently demanding that this approach should be applied to the full supply chain of the Wilmar Group, but so far neither the IFC nor the CAO, much less Wilmar itself, have been able to address this concern.¹¹

Endnotes

1. For full documentation relating to the complaints to the IFC CAO regarding Wilmar's operations, see FPP (nd) *Publications: The CAO story: contesting procedural irregularities and standards violations by Wilmar and the IFC through the Compliance/Advisor Ombudsman*. Available at <http://www.forestpeoples.org/publications/results/taxonomy%3A645>
2. Colchester et al 2011.
3. *3rd Complaint about Wilmar International*. 2011.
4. *Re: 3rd Complaint about Wilmar International, PT Asiatic Persada (PT AP), (IFC Project #26271)*, 2011.
5. See complaint: *First complaint to Wilmar on PT Asiatic Persada sale agreement*. 14th May 2013; and cover note: *Cover note to RSPO accompanying First complaint to Wilmar on PT Asiatic Persada sale agreement*. 14th May 2013.
6. See *First response from Wilmar to complaint on PT Asiatic Persada sale agreement*. 20th May 2013.
7. See *Response to Wilmar's first response to complaint on PT Asiatic Persada sale agreement*. 7th June 2013. Wilmar's response to the second complaint: *Second response from Wilmar to complaint on PT Asiatic Persada sale agreement*. 2nd July 2013..
8. See FPP 2013a *Letter to the International Finance Corporation requesting formal clarification from IFC about IFC procedures and agreements pertinent to the PT Asiatic Persada case*. 4th July 2013.
9. This meeting took place on 31st July 2013.
10. FPP 2013b *The World Bank's Palm Oil Policy*. 29th April 2013.
11. The latest appeal to the CAO to address these wider systemic issues was communicated on 7th March 2012. See FPP 2012.

Overview of the palm oil sector and FPIC in Palawan, Philippines

8

Arthur Neame and Portia Villarante

Oil palm development and the national context

Since the publication in 2011 of *Oil palm expansion in South East Asia: trends and implications for local communities and indigenous peoples* by Forest Peoples Programme and Sawit Watch, little significant change has occurred with regards to official policies on palm oil production in the Philippines. However, the industry, represented by the Philippines Palm Oil Development Council (PPDCI), the main palm oil industry body, appears to have ratcheted up its advocacy in favour of further support for its expansion with a critique of government inaction. On 12th July 2012 the PPDCI released a paper stating:

The country's palm oil imports from Malaysia alone have been soaring since the time President Aquino took office. For instance, in 2009, the Philippines imported only 119,229 metric tons of palm oil from Malaysia. This increased to 204,731 tons in 2010, and soared to 543,000 metric tons in 2011 worth PHP 28.03 billion. If the trend holds, the palm oil imports of the Philippines from Malaysia could reach 597,000 metric tons in 2012.¹

Reflecting a re-emerging aggressiveness within the industry, the report of the paper's release went on to state:

The leaders of the PPDCI believe that the Department of Agriculture officials are anti-Oil Palm Farming (OPF). They say that the [Department of Agriculture] DA officials have put the OPF expansion in the Philippines of 60,000 hectares to a standstill.

The local oil palm industry leaders suspect that the DA leadership has been convinced by the

distorted information from NGOs who are well-funded by the 'Western conspirators' to preach and magnify the so-called negative aspects of oil palm farming.

The report further states:

They [The leaders of the PPDCI] further suspect that the main purpose of the 'Western conspirators' is to spread erroneous information to prevent further growth of the production of cheap, highly healthy and nutritious palm oil so they could maintain a good portion of the global oil markets for soybean, sunflower and canola oils and at a higher price which many Filipinos cannot afford.²

The ultimate agenda of the industry was clarified towards the end of the press report:

The PPDCI suggests that President Aquino organise an interagency task force headed by the DA with the participation of the DAR, DENR, DOST, LGUs, DILG, DTI, PPDCI³ and the banking sector. They could prepare a palm oil development roadmap and promote the massive planting of oil palm to reach 300,000 hectares by 2016.

The PPDCI says that there are over one million hectares of grass and brush-lands in the Southern Philippines, Mindanao in particular, suitable for oil palm farming. If these areas are planted with oil palm, the Philippines could become a major palm oil exporting country just like Thailand, Malaysia and Indonesia.⁴

However, the government has not, perhaps, been as inactive as the Council suggests, with the registration of one Agumil-owned plantation and mill in Palawan and another oil palm expansion in the

Year	Production (in Metric Tonnes)	% change from previous year's production
1990	45,100	7.14%
1991	51,900	15.56%
1992	54,000	3.85%
1993	54,700	1.85%
1994	54,400	-1.82%
1995	53,000	-1.85%
1996	52,000	-1.89%
1997	50,000	-3.85%
1998	48,000	-4.00%
1999	48,000	0.00%
2000	54,000	12.50%
2001	55,000	1.85%
2002	56,300	1.82%
2003	59,000	5.36%
2004	60,000	1.69%
2005	61,000	1.67%
2006	68,000	11.48%
2007	75,000	10.29%
2008	82,000	9.33%
2009	90,000	9.76%
2010	92,000	2.22%

■ *National production of crude palm oil (CPO) showing trends over past years (in metric tonnes). (Sources: FAO Stat (nd); Index Mundi (nd))*

■ *Actual and projected volumes of imported crude palm oil (CPO) and palm kernel oil (PKO). (Source: Pamplona (nd))*

Year	Volume of importation (metric tonne)		TOTAL
	CPO*	PKO**	
2006	118,291	8,106	126,397
2007	123,499	8,282	131,781
2008	129,155	8,463	137,618
2009	135,071	8,647	143,718
2010	141,257	8,836	150,093
2011	146,907	9,029	155,936
2012	152,783	9,226	162,009
2013	158,894	9,427	168,321
2014	165,250	9,633	174,883
2015	171,860	9,843	181,703
2016	178,734	10,058	188,792
2017	185,883	10,278	196,161
2018	193,318	10,502	203,820
2019	201,051	10,731	211,782
2020	209,093	10,965	220,058

* Crude Palm Oil estimated to grow on average 4% annually

** Palm Kernel Oil estimated to grow 2.18% annually

Autonomous Region of Muslim Mindanao with the National and Regional Boards of investment respectively. The Board of Investment (BOI) has also registered a controversial PHP 174.4 million (USD \$4,182,251) palm oil investment in Opol, Misamis Oriental in Northern Cagayan de Oro, run by Nakeen Corporation.⁵ Zanorte Palm Rubber Plantation's proposed project in the towns of Sirawai and Sibuco in Zamboanga del Norte, with a budget of PHP 737 million (USD \$17,673,849) was also recently granted tax incentives by the BOI.⁶

The table above left shows that the production of crude palm oil (CPO) is rising. Where rises in a given year are in the order of 10% it is a likely indication of new plantations coming to harvesting maturity. Concomitant with the upward trend in production, the Philippines is also facing growing domestic demand for palm oil as shown by the table below left which illustrates actual and projected volumes of importation.

Whilst these figures come from the palm oil industry itself, and could therefore be expected to contain projections that reinforce their argument for more palm oil production, it was also recently reported during the Malaysia-Philippines Palm Oil Trade Fair and Seminar held in Makati on 16th April 2012 that imports from Malaysia 'rose 150 percent in 2011 to over 512,000 tonnes from 204,731 tonnes in 2010',⁷ far exceeding the industry's own projections.

Gross areas under oil palm

Harvested areas of palm oil in the Philippines were of 25,237 ha in 2003, 29,000 ha in 2007 and 46,398 ha in 2008.⁸ By 2011, plantations had increased to 54,748 ha.⁹ The PPDCI, in a draft Philippine Road Map for Oil Palm is calling for a further expansion in 2012 to 62,500 ha and an eventual expansion to 500,500 ha by 2022. Whilst the main market for palm oil is, at present, for edible oil, there is also some processing for cosmetics and industrial use.

Due to the fact that the demand for edible oils outweighs production so hugely at this time, the production of biodiesel from palm oil is negligible, although PPDCI is also calling for the Philippines to begin such production.

Patterns of production

The predominant mode of production in the Philippines remains large-scale plantations rather than small-scale production and milling facilities. The industry claims that this is necessary because of the economies of scale achieved by large scale plantations, despite the fact that palm oil is profitably produced in some parts of West Africa at the household or village-level.

It would appear that the plantation mode of production is favoured by local investors and financiers, including the primary investors and lenders such as Landbank. This may in part be due to the difficulty Landbank has in finding adequately managed and sufficiently well-established cooperatives to lend to for smaller scale production. It may also be due to the fact that the predominant outside investors hail from Malaysia and Indonesia, where large-scale mono-crop plantations are the primary mode of palm oil production. In Malaysia, the history of palm oil production stems from the conversion of large Federal Land Development Authority (FELDA)¹⁰ estates from rubber to palm oil in the 1980s. In other words, the predominance of the large-scale mono-crop approach to palm oil production may be the outcome of historical precedents in foreign investment patterns as well as one that is seen by investors as best suited to extract the maximum surplus from production, rather than a model chosen to maximise the returns and benefits accrued to rural populations.

Main export and import markets

Much of the crude palm oil and palm kernel oil produced in the Philippines is

shipped to either Cebu or Manila for further processing and refining. Palm oil prices in the Philippines are approximately the same as prices on the world market, while there is a 3% tariff on imported palm oil. It is therefore likely that the majority of the oil produced is consumed within the Philippines, although it is reported that some of the oil products are used as ingredients in cosmetics, soaps and industrial oils that end up being exported.

It is interesting to note that the BOI have insisted that 70% of the palm oil to be produced in Palawan be exported. It is unclear why this is the case, since local production effectively substitutes imports at this time. Since Agumil lacks the capacity to refine palm oil, it is most likely the plan of the company to export the crude palm oil. According to a national newspaper report:

Lim Chan Lok, Agumil president, executed an undertaking...committing to export at least 70 percent of the plant's total production.

Among the prospective foreign buyers are Just Oil and Grains Pte. Ltd. based in Singapore; COFCO East Ocean Oils and Grains Industries (Zhangjiagang) Co. Ltd. in Jiangsu Province, China and; China Resources Oleochemicals Co. Ltd. in Binzhou, China. Agumil will also try to market the products to other buyers in Malaysia.¹¹

Worth noting is the fact that exports of CPO from the Philippines to Malaysia stand every chance of being re-imported by the Philippines as refined product, since the bulk of palm oil imports in the Philippines come from Malaysia and Indonesia, with an all-time high of 512,000 tonnes in 2011.

Key companies and investors

The key companies engaged in palm oil production in the Philippines are Kenram, Agumil, Filipinas Palm Oil, Inc, A. Brown and Zanorte. Potential investors in plantations include First Pacific, the owners of Indo-Agri, one of the largest palm oil estate owners in Indonesia. Recent

reports indicate that the Department of Agriculture (DA) and the Department of Environment and Natural Resources (DENR) have been employing the trade and investments mechanisms of the Brunei, Indonesia, Malaysia and Philippines - East ASEAN Growth Area (BIMP-EAGA) to invite further investments. The Malaysian Ambassador is reported to have responded favourably to these invitations, and pointed in particular to the provinces of South Cotabato and Sultan Kudarat as potential areas for an initial 15,000 ha expansion of oil palm plantations.¹² The Provincial Government of Agusan del Sur also reported that it is developing a partnership with Shine Art Valley Co. Ltd. (SAVC) of South Korea for a 5,000 ha banana and oil palm plantation.¹³

From the information publicly available it seems that the majority of palm oil investments in the Philippines continue to focus on the production of crude palm oil and kernel oil rather than on downstream processing and refining, reflecting the existing mismatch between local production and demand. Whilst it would appear that the majority of oil palm plantation developments are carried out through joint ventures with foreign corporations (largely Malaysian or Indonesian to date) a considerable proportion of the new financing required for these developments appears to derive from Landbank of the Philippines. Landbank is a government owned and controlled corporation founded in 1963. First amongst its operating principles is to be a 'catalyst of countryside development and poverty alleviation'.¹⁴ It also has as one of its principles 'commitment towards environmental protection'.¹⁵ To the latter end, Landbank also has a corporate environmental policy which includes 'the conduct of appropriate environmental risk assessment and management' and a commitment to 'inform and influence its clients, suppliers and business partners to align with the bank's environmental management programs in their business operations'.¹⁶ In this regard, Landbank has an environmental due diligence policy under which:

...all projects directly financed by the Bank and collaterals offered as security, which are part of the project or used as project site, including projects of Cooperatives covered by the Philippine Environmental Impact Statement (EIS) System, are subjected to environmental assessment and monitoring until fully paid. Credit risks arising from the adverse impacts of the LBP¹⁷-financed project to the environment are identified, mitigated and monitored.¹⁸

Landbank's vision declares that it is 'in the service of the Filipino people' and that it is 'committed to improving the lives of all its stakeholders and working with them to lead the country to economic prosperity'.¹⁹ Despite these commitments and principles, the bank's environmental assessment and monitoring process is inadequate, tending to rely on the Environmental Impact Assessments (EIA) and Environmental Clearance Certificates (ECC) of the DENR. DENR's processes are known for being subject to political influence, particularly at the provincial level. It has been reported that, on occasion, EIAs are simply pre-written by proponents and then put before an independent verifier for signature in return for a fee.²⁰

In terms of social impact assessment and monitoring, Landbank, along with all other financial institutions in the Philippines, has no mechanisms installed, aside from a basic rating system on the financial and institutional sustainability of its borrower cooperatives. This means that, despite its mandate to spur 'countryside development' 'in service of the Filipino people', the bank has no mechanism to assess or monitor its social or economic impacts on populations affected by, but not borrowing from, its loan facilities.

Plantation-type agriculture tends to cover not only large swathes of land, but also directly or indirectly affect significant populations, some of whom may be among the most socially and economically marginalised in the country, including indigenous peoples. In this context, it would appear vital for the bank to be able to assess accurately its

performance as a catalyst of development for these peoples as much as for its borrowers. Like all other Filipino financial institutions, Landbank is not a signatory to the Equator Principles, despite being a borrower from the World Bank.

Palawan Case Study

Area in question

This case study was carried out in the municipality of Sofronio Española in Southern Palawan, around 130 km south of the provincial capital of Puerto Princesa. The study also encompassed the neighbouring municipality of Brookes Point, where the nursery and milling facilities of Agumil and its sister company Palawan Palm and Vegetable Oil Mills Inc. (PPOVMI) are located. Palawan Province is situated in the south-west part of the Philippine Islands chain. It is bordered on the north and west by the South China Sea and on the east by the Sulu Sea. Its southernmost tip faces the island of Borneo. The largest island of the archipelago, Palawan, is 450 km long and 50 km wide.

History, ecology and peoples

There are several possible origins of the name Palawan. One is the Chinese word *pa-lao-yu* meaning ‘land of beautiful harbours’; one is from the name of a plant the natives of Palawan called *palwar*; and another is from the Spanish word *paragua*, meaning umbrella, because the shape of the main island resembles a closed umbrella. Local communities are a mix of settlers primarily from the Western Visayas and Luzon and a small number from Sulu/Tawi-tawi. There are also communities of indigenous Palaw’an, whose concentration rises towards the inland and timberlands.

From the 15th century onwards, Southern Palawan came under the influence of the Sultanate of Brunei, until the area was ceded to the Sultan of Sulu in the 17th century.



■ Map from the Municipal Planning and Development Office, Sofronio Española

In the mid 18th century, the territory was ceded to the Spanish but local Muslim resistance to Spanish rule is reported to have continued until at least the mid 19th century and Spanish control over southern Palawan was always tenuous at best. The effective unified political administration of Palawan island was not really achieved until the arrival of the Americans and the creation of the province of Paragua in 1903, renamed Palawan in 1905.

The name of the municipality of Brookes point, previously known as Bon-bon, is derived from the military mission undertaken there in the mid-19th century by the so-called ‘White Rajah of Sarawak’, James Brooke, most likely in pursuit of trading opportunities and as a measure to combat local piracy against vessels moving to and from Sarawak. Brooke built a lighthouse, a clean water supply (both still standing) and a port in the area as a means of establishing it as a centre for trade. Sofronio Española,



■ *Nursery of Agumil Plantations, Inc. at Brookes Point, Palawan. Taken on July 12, 2012 / Portia Villarante*

meanwhile, was created from the northern part of Brookes Point in 1994.

Brookes point remains a commercial centre for southern Palawan. It is a first class municipality with a population of 58,537 in 2007 and comprises 18 barangay.²¹ The town is also a centre of agricultural production, including the recently established palm oil mill and nursery, as well as the site of proposed nickel mines. The port of Brookes point is a major docking point for commercial goods destined for Southern Palawan and for nickel mineral ores exported by Rio Tuba.

A portion of the municipality also reaches into the Mt. Mantalingahan Protected Landscape (MMPL). The MMPL is rich in plant biodiversity, with at least 351 plant species, distributed across 214 genera and 92 families. Of these, 16 species are identified as economically important, half of which are considered threatened and endangered. Eight previously unclassified plant species were recently recorded and at least five new ones discovered.²² Important forest tree species

in the MMPL are: apitong (*Dipterocarpus grandiflora*), malugai (*Pometia pinnata*), amugis (*Koordersiodendron pinnatum*), nato (*Palaquium luzoniense*), lomarao (*Swintonia foxworthy*) and Agoho del Monte (*Casuariana equisetifolia*).²³ 95 species of vertebrates are known to inhabit the MMPL. IUCN lists 16 of these as restricted-range species, 19 as vulnerable, two as endangered and two as critically endangered.²⁴

Wildlife is relatively evenly distributed within the protected area. The indigenous peoples living within it have often made use of some of the important bird and animal species to barter prime commodities from traders. Pet birds such as the talking mynah, blue-naped parrot and the Philippine cockatoo are heavily traded because of the price these animals command in markets outside Palawan. Mammals such as squirrels, bearcats, monkeys and mouse-deer are also traded.²⁵ Finally, the MMPL is a major source of water for domestic use, agriculture and fisheries in the surrounding five municipalities. Although there are plans to develop eco-tourism in the area, at present this activity remains minimal.

Sofronio Española is a 4th class municipality comprised of nine barangay. According to the 2000 census, it had a population of

26,801 in 5,479 households. In the 2008 Community-Based Monitoring System (CBMS) survey, Española was bottom in terms of the Human Development Index for Palawan. It is also one of the 100 poorest municipalities in the country. A 2007 Social Watch report cites a poverty rate of 58% for Española.²⁶ Access to education is very limited with 35.2% of elementary age children not attending school and 48.6% not attending high school. Sofronio Española tops malnutrition in the province with a prevalence rate of 22.98%, according to the provincial nutrition action officer.²⁷ In addition to the presence of the Citinickel mine, the town is a rapidly expanding frontier for oil palm plantations. Farmers have recently complained of laterite spills on their land due to mining activities.²⁸ Rice producers are generally from the families of migrants to the area, among whom the Ilonggos are predominant. Ricefields are semi-upland and not irrigated.

Company investigated

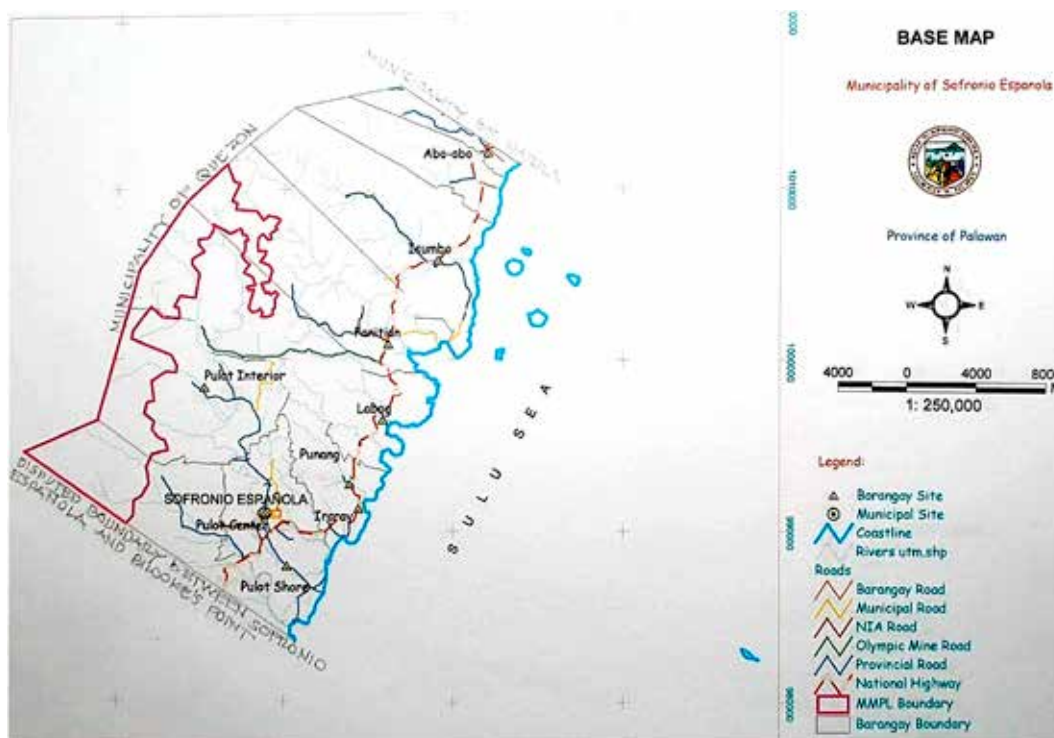
Agusan Plantations Inc. was established in 1993, as a Malaysian-Singaporean-Filipino partnership. Its first plantation of 1,800 ha was developed in Trento, Agusan

del Sur. Its first oil extraction mill started production in 1998 through its wholly owned subsidiary Agumil. The president of the company is Lim Chanlok Lim and its vice president is CK Chang. Incidentally, Mr Lim is a non-executive director and shareholder in REA Holdings PLC, a UK-based company with extensive interests in oil palm plantations and coal-mining in East Kalimantan, Indonesia (see case study on PT REA Kaltim Plantations, this volume). The plantation in Palawan commenced with the establishment of a nursery in 2006, followed by planting in the outlying Anchor and Cooperative areas in 2007. The area planted by or contracted to Agumil and its sister company PPVOMI currently extends to almost 4,000 ha. Agumil Philippines Inc. is 75% Filipino and 25% Malaysian-owned. PPVOMI is 60% Singaporean and 40% Filipino-owned.²⁹

Value chain and operations

Fertiliser is supplied by local suppliers, described as ‘the usual cartel’ by the

■ Map of roads and highways running through the municipality of Sofronio Española



management of Agumil. Seedlings are sourced in the form of germinated seed-stock from Papua New Guinea and Thailand and are raised in the nursery at Brookes Point. Haulage services are provided by local companies, some of whom are self-employed. Other haulage services are provided by commercial hauliers, such as CAVDEAL. CAVDEAL is also the company behind the new Evergreen Growers Cooperative in Iraray II, believed to cover 81 ha of purchased land. It is also a well known construction company in the Philippines, having been contracted to undertake major projects worth PHP 7.7 billion (USD \$187,881,350) from 1st July 2005 to 30th June 2008 in the Philippines. CAVDEAL is also known as a company previously blacklisted and debarred from bidding for World Bank-funded projects for a period of four years for its alleged part in rigging bidding processes for public works contracts.

Processing plants in Manila and Cebu are believed to be the main purchasers of the CPO and PKO produced by Agumil and PPVOMI. The plant manager was not willing to discuss details of purchasers, although under the BOI incentives it is reported that the Agumil mill in Palawan will export at least 70% of its produce to Singapore, China and Malaysia.³⁰

Overview of land acquisition process

The first area to be planted by Agumil was around the current mill and the nursery, known as the Anchor area, an area directly leased and managed by the company. The Anchor area extends from Brookes Point into Sofronio Española. The total Anchor area is reportedly 1,500 ha. Within Sofronio Española the Anchor area extends to 717 ha at present and is matched by 246 ha belonging to the Malalong cooperative. In this area people are engaged in a mix of direct lease to the Anchor area (that is to say, a portion of land from which the owners receive no share of production) and out-growing as a cooperative (from

which a share of production is received). This means that each owner within the Anchor-Malalong area receives as payment a portion in the form of land rent and a portion is reserved for net crop share after all costs of production and loans have been subtracted. Initially the idea was that Anchor and Malalong land would be split 50:50, whereas in practice it is closer to 70:30, thus reducing the prospects of future crop share for the Malalong cooperative members. One community member affected by the plantation noted:

Their [the company's] use of a 'sweet tongue' caught the attention of the land owners and convinced them to engage in the contract. The (promise of) big shares and benefits muffled what could have been said about the small amount in rent. (Jessie G. Galang, Barangay Pulot Interior Kagawad)

The largest proportion of land devoted to oil palm at this time is in the form of smallholders in schemes run by the company. However these are not independent smallholders, as they have been formed into cooperatives where land is jointly managed, as far as possible in contiguous blocks, by the company. A contract is signed between individuals and the co-op, which includes a marketing and management agreement with the co-op. In turn, the co-op has a marketing and management agreement with the company. This effectively means two contracts are signed simultaneously at the level of the smallholder and the co-operative. The first is an agreement to plant oil palm and to retain the land for 30 years. The second is an agreement to allow full management of the land by the company for a 10% management charge.

Increasingly, companies and groups of wealthy individuals are entering the area and buying up land for oil palm. In a number of instances, they are doing this in the names of local individuals and groups, and also forming so-called farmers' cooperatives in order to avail of the collateral-free financing offered by Landbank of the Philippines.

CAVDEAL is one such group, and they have reportedly recently purchased 81 ha of land in Barangay Irray II in Sofronio Española to this end. It was reported that they have formed a cooperative named Evergreen as the means to accomplish this. With regard to land acquisition, whilst the researchers found that the company did conduct consultations with communities, it would appear that no distinction was made between incoming settlers and indigenous peoples, and indeed there was no specific engagement with indigenous peoples or discussion of possible concerns that they may have had with the development of oil palm plantations on, or affecting, their customary lands. The company, and indeed, government agencies, rationalise this approach by saying that they were only seeking to plant oil palm on land over which there were privately held titles of ownership, and that they had specifically excluded planting in timberlands or areas without private title.

It was clear from interviews and discussions that timberlands and ancestral domains are largely conflated in the minds of both the company and the vast majority of local officials. Again, this reflects a historical reality whereby indigenous peoples have tended to continually withdraw into the uplands and into forested areas as encroachment by settlers took place over the past decades. However, it also confirms that no serious attempt seems to have been made to undertake any participatory analysis and mapping of these indigenous peoples' land rights and uses.

It proved impossible for the researchers to obtain community maps of areas under plantation during interviews and focus group discussions. Although the researchers were informed that the company held such maps, it was clear that the community did not. This begs the question as to whether any effective form of participatory community-based land use mapping was ever conducted. The researchers were informed time and again by Local Government Unit (LGU) officials, the Palawan Council for



■ *Palaw'an indigenous peoples interviewed in Barangay Irray. They are composed of indigenous peoples' organisation members, land owners, farmers and plantation workers / Portia Villarante*

■ *Public notice of permit for the oil palm plantation in Barangay Pulot Interior, Sofronio Española / Portia Villarante*



Sustainable Development (PCSD), the company and Landbank loan officers, that planting was only taking place on 'idle lands'. In the absence of participatory land use mapping, this may well turn out to have been a convenient assumption on their part, or may have been the result of ignorance of the ways in which indigenous peoples use, own and manage these lands, in accordance with customary laws and practices. This is important because, as will be demonstrated below, some of the major concerns expressed by indigenous peoples and local communities regard changes in land use.

National legal framework of land acquisition

Land titling in the Philippines makes use of Torrens titles, a system of land title where a register of land holdings maintained by the State guarantees an indefeasible title to those included in the register. However, a large range of tenurial instruments exist side-by-side, and often in conflict with one another. Titling of publicly owned land is also possible through a number of routes, basically divided into judicial and administrative routes. Aside from direct titling of land, there also exist various leasehold and stewardship agreements.

Palawan is popularly known as ‘the last frontier’ of the Philippines, reflecting not only the rich biodiversity and the prevalence of remaining primary forest on the island, but also the widespread availability of land within the public domain which is supposedly ‘alienable and disposable’. Palawan has been a site of relatively large-scale in-migration, starting particularly in the 1950s when the government of the Philippines undertook a programme to resettle landless rebels who had participated in the ‘Huk’ rebellion following the end of the Second World War. In fact, the municipality of NARRA in Palawan, to the north of Sofronio Española, derives its name from the National Resettlement and Rehabilitation Administration (NARRA) which was formed in 1954 and charged with resettling dissidents and landless farmers. The scheme was particularly aimed at rebel returnees, providing home lots and farmlands in Palawan and Mindanao of up to 24 ha each.

Land tenure of indigenous peoples and local communities

The influx of settlers in Palawan gathered pace in the 1950s, as the government saw the region as a ‘frontier land’ where agrarian settlement should be encouraged. In succeeding decades, settlers continued to arrive in even greater numbers as a result of word-of-mouth recommendations from relatives who had already migrated to the

area, and fuelled by growing land scarcity in the Western Visayas. As settlers arrived, they frequently engaged in informal land sales with the Palaw’an residents. These sales were informal in the sense that they were frequently undocumented and not registered, since the Palaw’an did not possess legal title to the land, which was considered public land.

The result of these informal land sales was that a large number of Palaw’an moved further from the fertile coastal plains and into the hinterlands, whilst others continued a coastal existence, primarily reliant on fishing. Following their informal purchase of lands, a number of settlers then paid real estate tax on the land (known as tax declarations) as a means of staking a legal claim to the land and eventually securing full titles. Others simply continued their occupation of the land.

In June 1988, the Comprehensive Agrarian Reform Law (CARL) came into effect and under the Comprehensive Agrarian Reform Programme (CARP) farmers were permitted to acquire land that they tilled. In many instances, and to speed up the implementation of the Agrarian Reform Programme whilst avoiding conflicts with powerful political-economic interest groups, the first lands to be distributed were public lands classified as alienable and disposable. This meant that much of the land in provinces such as Palawan was subject to rapid land redistribution.

The land was distributed largely to those migrant settlers, or their children, who had arrived in Palawan in the 1960s and 1970s following word-of-mouth news from relatives that there was vacant land to be had in the province. Others who managed to avail themselves of Certificates of Landownership Agreements (CLOAs) were relatives living elsewhere, some local government officials and local community leaders. The result was that the figures for the Agrarian Reform Programme’s accomplishments looked good but that the beneficiaries were often not those qualified

to be such, and widespread incursion into unregistered ancestral domains of indigenous peoples took place.

Such was the case with lands both occupied and unoccupied by settlers in Palawan, especially given the fact that the Palaw'an in Sofronio Española and Brookes Point had not filed claims to land by filing for Certificates of Ancestral Domain Claims (CADCs) in the areas they continued to occupy. In the absence of such claims, it became much easier for the Department of Agrarian Reform (DAR) to assume that land remained available from the public domain for distribution.

The researchers also found evidence that some of the land in the CLOAs should not have been included, since it was steeply sloping land (land of more than 18% slope is excluded from CARP coverage). In this case, the land was used by indigenous peoples in Iraray II as community forest, and particularly as a source of medicinal and ritually used plants. It appears therefore that an erroneously issued CLOA covers this land and that it has now been purchased for the planting of oil palm.

The result of this situation was that by 1996, CLOAs were distributed in Sofronio Española covering large swathes of land, and such was the apparent scale of the supposed public domain that it was common for these to cover five ha per CLOA, whereas in other parts of the country the DAR was unable to reach the target of three ha per household. Among the CLOA recipients were also a number of community leaders and elders from among the Palaw'an.

In addition, rather than generating individual CLOAs per household, DAR was also in the habit of distributing so-called 'Mother CLOAs' encompassing a community of Agrarian Reform Beneficiaries (ARB), with the idea that individual subdivision of the CLOAs could be undertaken at a later date. It is largely these CLOA-titled lands, whether covered by individual or mother-CLOAs, that have been targeted by Agumil/

PPVOMI for oil palm development. Indeed, Agumil/PPVOMI maintain that they are not interested in lands which do not possess private titles and which do not provide the small-grower with clear security of tenure. Both prior to and after the distribution of CLOAs by DAR in the mid-1990s, many indigenous peoples continued to make use of the lands that were distributed by DAR, even though they may have been informally sold to settlers or covered by a formal CLOA. Although these lands had usually been logged over and were considered 'idle' lands by the government and settlers alike, they still continue to provide a number of resources for the Palaw'an. This is discussed further in the following section on FPIC.

The announcement of plans to plant oil palm in the vicinity of Española and Brookes Point was followed by the involvement of wealthy individuals and groups from outside Palawan. These groups of investors are establishing so-called cooperatives and are also reported to be holding land in the names of local individuals and groups (known in the Philippines as 'dummies'). This is a worrying development from a number of perspectives. First, the ways in which companies are re-forming themselves into cooperatives undermine the local, territorially defined, and supposedly open, membership policy of cooperatives. Second, these 'corporate co-ops' may be availing of financing from Landbank that is supposedly destined to enhance the financial and operating capacities of small farmers. Third, the land purchases are encouraging a reversal of agrarian reform and the concentration of land into large-scale plantations thus excluding the rural poor from full and meaningful participation in agricultural development on their own land, except as plantation labourers.

This leads to concerns that oil palm in Palawan, rather than benefiting ARBs and bringing about a general rise in rural prosperity, which it has the potential to do (albeit subject to a range of appropriate regulations) may in fact be leading to a

concentration of land ownership in southern Palawan in the hands of local elite and, in the long term may lead to the marginalisation of both labour force and landowners in favour of those with greater access to capital. If this is the case, it could be argued that oil palm will end up being socially regressive on the island, despite the fact that this could be avoided through appropriate monitoring of land use and ownership, strict implementation of Landbank's mandate for financing rural producers and avoiding infiltration by groups using local dummies to front for them.³¹

Protections for farmers and indigenous peoples in the face of palm oil expansion

The majority of the small farmers in the areas planted with oil palm are holders of CLOAs, covering land distributed to farmers under CARP. CLOAs are issued to farmers after they have been verified as ARBs and after the DAR has identified land for them. The CARP is supposed to be a programme offering 'land to the tiller' under a scheme payable by amortisation to Landbank over a period of 10 years. During that period of 10 years, the land is not legally permitted to be sold. Following payment of the amortisation, the CLOA can be converted into a Transfer Certificate of Title (TCT) which makes the land fully alienable and disposable. In order to overcome these restrictions, and in the face of the need for capital or for expenses for emergencies, it is not uncommon for farmers to 'surrender' their CLOAs to financiers or others.

In some cases, the turnover of the CLOA may be an informal arrangement, while in others it may be accomplished through signing a Special Power of Attorney (SPA). The SPA, if indefinite, may allow the holder of that power to exercise all rights over the land. SPAs can also be used to avoid the usual transaction taxes when buying or selling land, or to avoid the protection afforded by leaseback or tenancy agreements. Other farmers are holders of regular TCTs. These are the purest land

titles, implying full ownership and control of land. However, they too may be subject to Special Powers of Attorney.

Republic Act 8371 or the Indigenous Peoples Rights Act (IPRA), promulgated in 1997, serves as the national law that protects the rights of indigenous peoples in the Philippines. Under its Implementing Rules and Regulations, indigenous peoples have the 'right to accept or reject a certain development intervention in their particular communities'. IPRA also contains a provision that clarifies the scope of the consent process, although property rights that pre-date the entry into force of IPRA are 'recognised and respected'. Representatives of Agumil Plantations Group stated that they do not encroach on any land that does not have proof of ownership.

Section 65D of Republic Act 7881³², an Act amending certain provisions of Republic Act 6657 or the Comprehensive Agrarian Reform Law of 1988, states:

The change of crops to commercial crops or high value crops (in CLOAs) shall not be considered as a conversion in the use or nature of the land. The change in crop should however, not prejudice the rights of tenants or leaseholders should there be any and the consent of a simple and absolute majority of the affected farm workers, if any, shall first be obtained.

Chapter 1 Section 2C of the Local Government Code of 1991 of the Philippines states:

It is likewise the policy of the State to require all national agencies and offices to conduct periodic consultations with appropriate local government units, non-governmental and people's organisations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions.³³

Land grabbing and land conflicts

The General Manager of Agumil Plantations Group in Palawan stated that when there

are boundary conflicts, the company sends surveyors to discuss and identify the boundaries and make an assessment of the dispute, in order to 'try to be fair on both sides'. If the conflict cannot be settled, the surveyors go to the *barangay* to settle the matter, and the conflict usually ends there. This matches information obtained from the community in Pulot Interior, which stated that conflicts are not infrequent and that it is the area supervisor from Agumil who usually responds to these. The supervisor then seeks the help of the *barangay* in settling the issue.

However, not all conflicts are resolved in a 'fair' manner. A CLOA-holding indigenous leader in Barangay Iraray II raised concerns over the overlap of the oil palm plantation with his land. This conflict involved the plantation being developed by CAVDEAL. When the indigenous leader pointed out that the company had crossed the line formed by DAR's boundary markers, he was told that this was because the marker had been moved. When he protested against the apparent trespass into his land, he was told by CAVDEAL that he should have his land resurveyed at his own expense if he wished to pursue his complaint.

However, no reports of immediate or gross violations of human rights, such as direct intimidation or use of physical threats,

were reported by local communities. Issues tended to revolve around labour rights, the problem of lack of information available, and an ongoing lack of communication between the company and affected communities and growers. Formalised processes to respect the right to FPIC of these communities were not conducted, since under the laws of the Philippines FPIC is confined to indigenous peoples and the company maintains that it is not planting within indigenous territories. This assertion is disputed by some indigenous peoples within the concession who, while agreeing that the lands may have been covered by the Agrarian Reform or are lands covered by tenurial instruments such as Community-Based Forestry Management Agreements (CBFMA), affirm that these lands are nevertheless historically part of their customary ancestral domain.

Political connections of owners of large estates

A number of local government employees are themselves cooperative members and landowners. For example, the Municipal

■ *Focus Group discussion with landowners, workers and coop members in Brgy Pulot Interior / Bienvenido Ollave Jr.*



Assessor of Sofronio Española is also a Board member of Tapisan co-operative, and went to Mindanao in 2003 with the then Mayor to assess if it would be suitable to grow oil palm in their municipality. He then helped identify the first 1,000 ha as a pilot area for oil palm plantations. When asked for a copy of the map of the 1,000 ha, he said that it was not available in his office. At the same time, the Assessor also made clear that since the original 1,000 ha had been directly leased to the company this involved considerable 'sacrifice' on the part of the owners of that land and that 'they should be considered heroes' as they ended up renting their land without the benefit of receiving a share of production. He further stated that this was a condition and consequence of the company's entry into the area.

The Municipal Assessor is a forthright and direct advocate of the palm oil industry in Española, and he evidently has a firm belief in the economic potential of the industry, both as a source of employment and as a source of increased returns from lands that, according to him, have little other economic value or productivity. He was less emphatic, however, concerning the potential for revenue-generation for the municipality despite the fact that his major official role is to ensure the efficient collection of real estate taxes in the municipality.

Perhaps of greater concern is the apparent conflict of interest revealed in the Assessor's involvement in the palm oil industry. It was apparent that his determination to pursue the development of the industry was as much concerned with finding the means to make his own land productive, and to realise the necessary investment in the land and generate a personal income, as it was to pursue local economic development. It was clear that the Assessor saw nothing wrong with this, and that he would happily justify the realisation of both personal gain and local economic development as containing no inherent contradiction. However, this should be matched with the fact that he was able to use information (on land use, tax

assessments and land ownership) that was only available to him by virtue of his office to pursue his goals. He was then able to use this information to collaborate with others, including Landbank and company officials to pursue the development of oil palm in the Municipality. It should also be noted that oil palm development has never been included in the Municipal development plan, either prior to the visit by the Assessor and other colleagues and partners to Agumil in Mindanao, or since the development of the plantations.

It is curious that the two most significant expanding industries - mining and oil palm - are not mentioned in the current Municipal plan or, seemingly, in the draft plan currently being prepared. Yet both endeavours were able to proceed due to support of local government officials. The failure to include palm oil in the municipal plan was explained by officials as being due to the opposition of the former mayor who had a preference for the planting of rubber. This points, then, to the fact that some of the most significant developments in the Municipality are 'unplanned' in that they have not been subjected to effective public scrutiny by the constituents of the Local Government Unit. Instead, they appear to have been advanced by certain local civil servants who themselves have vested interests in the development.

Inclusion of palm oil in the public planning processes and its discussion in the Comprehensive Land Use Planning (CLUP) and Zoning Ordinances (ZO) of the municipality, if properly and openly undertaken, could have permitted public scrutiny and official study of the likely impact of the industry on the environment, employment and land ownership and control over natural resources of local communities and indigenous peoples. As it stands, it appears that the holders of official information have been able to make use of this information in pursuit of the development of their own business interests. Whilst it would be difficult, under current legislation in the Philippines, to cite this

as a direct example of graft or corruption, the lack of proper public scrutiny certainly points to governance shortcomings, including a lack of accountability to local constituents and the possibility of undue influence by local civil servants.

Environmental impacts of expansion

We do not encroach into forest reserves ...
People are not pinned down or pushed aside.
(Luigi Dominguez, Agumil General Manager)

Incidences of clearing in timberland for oil palm plantations in the municipality of Quezon have been reported by the Palawan Network of NGOs Inc. (PNNI). At least three cases of illegal logging, that is to say, felling timber without the requisite permit from the DENR, have been filed. In one of the cases, it was reported that approximately 25 ha of timberland had been cleared for an oil palm plantation. It was also reported that behind the timber felling lie the interests of outside investors hoping to establish large scale plantations under the names of local residents.

In Iraray II in Sofronio Española, one Palaw'an vendor of land complained that he was unaware that the CLOA-titled land he was selling included a portion of sloping forest land which is used as community forest, particularly for the collection of medicinal plants. It would appear from the initial information received that this portion of land should never have been part of a CLOA in the first place, since land above 18% slope should have been excluded from coverage under the rules of CARP.

Communities reported too that the creation of roadways in the plantations for hauling both fertiliser and FFB was causing eroded gullies in the plantations and contributing to siltation of local creeks and rivers. The communities also stated that run-off from the plantations has accelerated and contributed to occasional local flooding.

Finally, a ubiquitous concern throughout Pulot Interior, and also expressed in Iraray

II, was the problem of the intensity and duration of rat infestations. Communities report that rat infestations have become a recurrent issue since the arrival of oil palm, and that prior to this, it only occurred every five to 10 years. Rat netting was supposed to be a counterpart of growers, but none was observed in any of the plantations. Workers reported that it was common to find large nests of rats in the palms at harvest time, and local communities said that their crops and houses had at times been overrun by rats.

Working conditions

It is evident that the oil palm plantations in Sofronio Española provide employment opportunities to local inhabitants. Almost all the labourers interviewed stated that the oil palm helped them acquire regular work and gave them additional security of income, despite their frequently voiced concerns over delayed salary payments and overall working conditions. At the time of research, there was no data available from the municipal government as to the exact increase in employment since the oil palm company started its operations in Palawan. However, according to the Philippine Coconut Authority's (PCA) Palawan Field Office 2009 Year End Report on Palawan Palm Oil Industry Development, oil palm projects require one worker per hectare.³⁴ This means that if the total area planted with oil palm is of 3,790 ha, the oil palm project is providing 3,790 jobs to community members.³⁵ Nevertheless, on the ground, it is evident that the willing and available labour force within Sofronio Española and the nearby towns is not enough to meet the labour demand in the plantations, thus encouraging in-migration from nearby regions.

The impact of employment in the plantations is already being felt by the community. Although there is a shortage of labourers, those interviewed feel that they are easily disposed of by the plantation company. They feel that their complaints



■ *Plantation workers in Barangay Punang, Sofronio Española / Portia Villarante*

are either seldom entertained or have many times backfired on them, usually in the form of indefinite suspensions. There are workers, however, who take advantage of a close relationship with the supervisor or the leadman in the plantations to receive lenient or more favourable treatment. Since work in the plantations started in 2006, the labourers received salaries which started at USD \$1.90 (PHP 80) and have periodically increased to the current rate of around USD \$5 (PHP 210). The current rate was only recently implemented and now adheres to the government standard on minimum wage.³⁶ Some workers said that where salary arrangements are made in which food is included, the ration is usually very little, and that there is no drinking water provided. Some workers from barangay Iraray previously also received a year-end bonus, but only amounting to USD \$2.38 (PHP 100). During holidays, double pay is provided to regular company workers, while regular pay is still provided to contractual

workers. Workers also reported that they are required to pay for contributions (PHP 50 per ticket) for events organised by the company, such as a Christmas party or an activity in celebration of Labour Day, regardless of whether or not they actually attend the event.

They [Agumil] conducted public consultations, meetings and information dissemination. Mr. Gil Mahano, supervisor for Agumil conducted a meeting in 2011. During planting, there were quite a lot of workers but later on they decreased in numbers because of delays in payment of wages and because the work is far away. (Josielyn Aplao, daughter in-law of the Palaw'an leader Panglima Aplao)

Salary provisions to workers are different depending on the area and the type of work they do. Some receive their salary per day or per month, but a common complaint is that the salary is always delayed. This is reportedly caused by the priority given by the company in paying off Landbank loans and the current insufficiency of income derived from harvests. Due to the delays in salary payments, most workers enter a credit system, known as *bunggo*, whereby they can loan

goods from stores (company, cooperative or privately-owned). However, they end up paying 10% to 15% more for those goods than they would have paid for them if they paid outright. They also said that by the time they received their salaries, most of it would go to the payment of the *bunggo*.

There are also frequent and consistent reports of ‘missing’ days from the records of work of the labourers. Workers said that they only know about the missing days on payday, and that complaints simply receive the response that they are being paid what is reflected in the record submitted by the supervisor to the company. Workers do not have their own copies of their work records and so there is no system for countersigning records held by both worker and field supervisor. Inconsistencies are always in favour of the company and the growers’ cooperative.

Furthermore, there are convincing allegations of children below 18 years of age having been hired in the plantations. Under Philippine law this is not in itself illegal, although there are strict prohibitions on children being involved in hazardous labour and on the hours they can work, especially for those aged 15 and below. Even for 16 to 18 year-olds, there are prohibitions on the entry of children into ‘hazardous labour’ and there is every argument for insisting that work in oil palm plantations is hazardous, due to exposure to extreme temperatures, dust and possibly pesticides, as well as the dangers of rat or snake bites, in addition to the wielding of sharp knives and the need to carry heavy loads.

The employment of those under the age of 18 has, according to Agumil/PPOVMI been addressed by now requiring each worker to show a community tax certificate (aside from the *barangay* clearance) on application which bears the birth date of the applicant. However, the community tax certificate is obtained from the municipal office and the birth date is usually dictated by the applicant, with no official proof of birth required by the same office. The researchers were also informed that workers

are only required to show their community tax certificate once a year at the beginning of the year. There is therefore still a window for under-age applicants to apply and work in the plantations. According to workers interviewed, and some of the cooperative out-growers, it is a distinct possibility that some child labour is still taking place.

With the entry of companies such as CAVDEAL and San Andres that have started to buy lands and plant oil palm, workers interviewed said that new policies on contractual or daily labour have started to emerge. They said that once they start working for one company, they are not permitted to seek work with another and are turned away if they do. In this way, companies are able to maintain their workforces. This is likely to have an effect on wages and additional benefits, as well as on working conditions, as competition for labour is diminished and workers are unable to move to work in areas or with groups where they feel terms and conditions may be more favourable. As a result, some workers stated that they had thought of organising themselves to bring their complaints to the management. However, they are afraid they will lose work and will find it difficult to find further employment in any other oil palm area if they challenge current employment practices.

The current General Manager of Agumil said that he had not received any complaints from the ground in his six months of work in Palawan. However, he also made clear that he has not conducted extensive visits to communities. It was apparent to the research team that an effective system of transparent communication concerning labour practices from the Agumil management to the field workers is lacking. Not only does this give rise to favouritism, the development of new forms of clientelism and the possible infringement of labourers’ rights under national and international law, but it is also likely to be detrimental to productivity.

According to the Municipal Assessor of Sofronio Española, who is also a Board

member of the Tapisan growers' cooperative and a grower himself, there are plans to construct bunkhouses near the plantations. This was explained as a means of ensuring that workers can get to the plantations on time, and to minimise their cost of transport. Currently, workers are picked up and brought to the plantations between five and six in the morning and the working day starts at seven in the morning, ending at four in the afternoon, with a one-hour lunch break at noon. Although the establishment of bunkhouses for the workers may seem as though it would be cost-effective for the company and the cooperatives, the social impact of this needs to be carefully assessed. Bunkhouses generally result in larger populations of single males, living far from home. This can create problems of isolation for the workers and impose social problems on communities. Historically, bunkhousing employees has also resulted in the creation of a docile captive labour force, dependent on their employer for all their needs, unable to demand fulfilment of their labour rights and in competition with local residents. If the project goes ahead, the company and the growers' cooperatives will need to carry out strict monitoring of the conditions in which workers live and host communities should be thoroughly consulted concerning the possible impact of the project.

Financing of operations

Landbank is the primary source of financing for the production of oil palm in Palawan. Landbank's exposure runs to PHP 144,000 (USD \$3,428.71) per hectare over four years. As a result of lower-than-projected income during the first year of commercial harvesting, Landbank is now having to consider restructuring the loans it has made to the growers' cooperatives and the loans it has made to Agumil for construction of the processing plant and nursery.

The initial plan had been for the cooperatives to start paying their loans from the proceeds of crop shares by the fourth year, and

then to seek one-year loans of working capital which could be rolled over on an annual basis thereafter, whilst the initial capital loans would be amortised over a maximum of 10 years. However, this has not worked out largely due to the massive increases in costs of oil-based inputs such as fertiliser, higher than foreseen labour costs and lower than forecast productivity. As a result, Landbank is considering not only restructuring loans at this point but also undertaking 'rehabilitation' of the plantations which received lower-than-optimal inputs during the initial period due to the high costs of those inputs.

Fortunately for landowners, the cooperatives' debts to Landbank are not collateralised against their land. However, they will find it very difficult to liquidate their assets or to switch to alternative crops, should they wish to do so, given that their land titles are held either by Landbank or the cooperatives in Landbank's stead, and due to the fact that they have a 30 year production and marketing agreement with the company through their cooperatives.

Wider effects on rural economies and communities

In almost all the focus group discussions with both farm labourers and small landowners, there was general agreement that the introduction of oil palm has the potential to raise incomes and to spur rural development. However, there was less agreement as to how truly beneficial the current form of development would be, especially for the poorest of the current residents in the oil palm areas.

Two eventualities are likely as a result of the rising demand for land. First, poorer households are likely to be deprived of access to land. Second, a growing rural differentiation will take place. At the lower end of this rural differentiation are likely to be the indigenous peoples in these areas. Whilst some indigenous peoples are currently gaining benefits from increased

and more regular incomes, many of the out-growers' cooperatives and the staff of Agumil/PPOVMI expressed a clear preference for non-indigenous labourers, repeatedly stating that indigenous peoples lacked the discipline to make good workers. As it is, there appears to be the beginning of a wave of migrant labour coming in to find work. A considerable proportion of the company's regular labour force is said to come from their plantations in Mindanao.

In the longer term, and assuming that the cooperatives and plantations are effectively rehabilitated after the restructuring of current loans, it would appear that a considerable number of indigenous peoples are likely to end up as rural labourers dependent on wage labour. This is likely to cause a reduction in income poverty but also a loss in their diversity of income and their diversity of direct access to food and non-food resources.

At present, palm oil production is not proving profitable in Palawan, largely due to the significant rise in the cost of oil-based inputs, such as fertiliser and the higher than expected costs of transport and milling costs incurred as a result of oil price rises since 2008 in the face of loan repayments to Landbank. The Municipal Assessor reported that there is little apparent increase in the local revenue base as a result of oil palm planting at this stage. Assuming that Landbank's terms for loan restructuring are generous enough to permit an early rise to profitability and that the rehabilitation of plantations and growers' cooperatives is sufficient to overcome the problems during the gestation period, it is likely that landowners will see rising levels of income from land. If this is the case, further conversions of land to oil palm are likely to occur, provided that financing continues to be available.

This in turn is likely to lead to the return of further absentee landowners, or to a rise in *de facto* absentee landlords. The question then will arise as to the extent to which profits and tax revenues are retained



■ Extract of production agreement between cooperative and landowner / Portia Villarante

■ Fresh fruit bunches for pick up at Barangay Pulot Interior, Sofronio Española, Palawan / Portia Villarante





■ *Group discussion with Pala'wan indigenous people in Sitio Maribong, Barangay Pulot Interior, Sofronio Española, Palawan / Portia Villarante*

in the locality. Currently, the local trading and commercial centre is the town of Brookes point, the site of the processing plant, rather than Sofronio Española, where the largest areas of plantations are located. It is likely that most commercial developments will occur in Brookes Point due to its comparative advantages in terms of shipping and communication facilities.

Aside from labour costs, another major variable cost is the trucking of FFBs to the plant. Faced with a shortage of local trucking facilities and without the capital to finance the expansion of local trucking, the company appears to have come to an agreement with CAVDEAL. Once again, it would appear that retained profits, and even much of the wages paid to their drivers (the majority of whom are believed not to be local), are likely to flow out of the area rather than be retained locally.

Finally, palm oil - rightly or wrongly - is receiving much of the blame for the decline in coconut productivity due to concerns about pest infestation following the widespread introduction of oil palm into the area. If palm oil proves as profitable as projected, there is a likelihood of continued pressure to sacrifice

coconut for palm oil, despite the fact that a properly financed programme of replanting and intercropping with adequate technical support could lead to renewed profitability. The likelihood is, therefore, of a growing dependency on a mono-crop economy of palm oil with the potential long-term risks that this dependency can pose to local food security, livelihoods and the local economy.

The process of respecting the right to Free, Prior and Informed Consent

Perspectives: the company

Agumil claims to have stayed away from untitled lands and from lands claimed by collective tenurial instruments, stating that it can find enough land covered by individual titles. At the same time, the researchers were informed that the company was attempting to enter an area covered by a CBFMA (Community-Based Forestry Management Agreements) in the town of Quezon, on the East coast of Palawan. In Tagosao, also in Quezon, the NGO network PNNI has conducted activities with DENR to prevent the illegal cutting of timber to allegedly make way for oil palm.

Villanueva 2011 also reports that there were attempts to convince indigenous peoples in Berong, Quezon to allow oil palm planting to taken place within an area covered by

a Certificate of Ancestral Domain Claim (CADC). Rather than have this put forward by the company, which would require a lengthy and formal FPIC process through the National Commission on Indigenous Peoples (NCIP), the community had been encouraged to propose the project thereby rendering it a 'community-initiated' proposal and resulting in a much abbreviated process with the NCIP. NCIP Provincial Officer Rolando Parangue described this as 'a circumvention of the FPIC process, which is not illegal'.³⁷

Perspectives: the government

The National Commission on Indigenous Peoples (NCIP) is the primary government agency responsible for overseeing and implementing the protection of indigenous peoples' rights under IPRA (the Indigenous Peoples' Rights Act) and its corresponding rules and regulations, including the rules pertaining to free, prior and informed consent (FPIC). Like the company, NCIP also states that the majority of lands on which oil palm is planted are subject to individual titles.

NCIP's rationale was that individually titled lands are not covered by FPIC regulations, since the choice of crop to plant is a private household decision rather than a collective community decision. They maintain this position, even if the total land area to be planted is so large it will impact the whole community, although Provincial Officer Parangue did describe this as a 'loophole'.³⁸ At the same time, the Provincial Officer also explained that he felt the company's main reason for focusing on individually titled land was that it would be too difficult for them to undertake the formal FPIC process in areas without individual titles and subject to customary use by indigenous peoples.

The problem with this rationale is that it reduces the right to FPIC to a particular type of landholding, namely, to land on which there are no individually owned titles and/or over which no indigenous peoples are formally making known a longstanding claim. This commonly subscribed to perspective has the

ultimate effect of undermining the concept of ancestral domain, to which most indigenous peoples adhere. Ancestral domain is a term deliberately used, since it includes more than land. A dictionary definition of 'domain' tells us that is either one or a combination of the following:

1. A territory over which rule or control is exercised;
2. A sphere of activity, concern, or function;
3. A political or cultural arena.³⁹

For the Palaw'an, the relationship with land is not normally one of ownership, and historically the notion of land ownership may well have been an anathema. Land itself was not so much seen as a material resource, but as a spiritual, cultural and physical arena from which resources such as plants and animals are accessed and within which rituals are conducted, be they rituals for healing, burial, marriage, decision-making or for managing conflict. Of primary concern to the Palaw'an, therefore, is the issue of 'access' to those resources and sites of religio-cultural practices, rather than formal recognition of title.

Unfortunately Philippine law and bureaucracy seem to have difficulty in respecting these perspectives. This is not for a want of aspiration and belief in the principles of the law, but because of the overriding role of land title in the Philippines as a whole. Under the Philippine system of land laws, it is impossible to guarantee absolute and perpetual usufruct rights other than through the express granting of title. This explains why even the poorest peasant farmer, poor urban settler or Overseas Filipino Worker (OFW) will always state that their ultimate dream is, aside from educating their children, to own their own land. No other claim will do apart from absolute title, and this reflects the legal and moral uncertainties pertaining to anything less. The bureaucracy in the Philippines, including that of the NCIP, appears to share these mores. On top of the conceptual shortcomings is the complicated proceduralism of respecting the right to FPIC in the Philippines.

Perspectives: the local communities

For many indigenous peoples in the Philippines, including the Palaw'an, ancestral domain is as a traditional concept that revolves around the notion of relatively uninterrupted access to resources, rather than to land. In other words, it was what the land produced that matters. Until the arrival of settlers and colonists in Palawan, the cultural and economic life of the Palaw'an was largely centred on the gathering of forest products, fishing in coastal waters and some small-scale swidden farming. What belonged to them was not the land, but what came from it. This to some extent explains the relative lack of resistance by the Palaw'an to the arrival of settlers, which contrasts with, for example, the resistance encountered by colonists and settlers who entered the territories of Moro Mindanao or the Cordillera, where control and ownership of land was clearly defined according to family, clan and tribe.

It is in this context then, that indigenous peoples accepted settlers as far back as the 1950s, and then accepted the distribution of CLOAs by the DAR to the children and grandchildren of those settlers in the 1990s with little dissent. The distribution of the later Agrarian Reform titles was also, no doubt, assisted by the fact that local indigenous leaders who received CLOAs were more exposed to the external and, by then largely lowland, concept of landownership, and gladly accepted it.

Former United Nations Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen, described how land is viewed by different sectors:

Farmers often see it as a productive resource. Indigenous peoples tend to see land as part of something greater, called *territory*. Territory includes the productive function of land but also encompasses the concepts of homeland, culture, religion, spiritual sites, ancestors, the natural environment.⁴⁰

Stavenhagen goes on to make the point more firmly by stating:

While access to land for productive purposes (agriculture, forestry, herding, foraging) by individual members of indigenous communities is certainly of the greatest importance for indigenous people, there are other factors involved as well. Indigenous communities maintain historical and spiritual links with their homelands, geographical territories in which society and culture thrive and that therefore constitute the social space in which a culture can reproduce itself from generation to generation. Too often this necessary spiritual link between indigenous communities and their homelands is misunderstood by non indigenous persons and is frequently ignored in existing land-related legislation.⁴¹

Stavenhagen then makes the important link between the themes of territory and culture and ILO Convention 169 Article 7.1, which states that:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

Despite its relatively progressive legislation on indigenous peoples' rights, the Philippines is not a signatory to ILO Convention 169. However, it is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Relevant articles in UNDRIP which may be applicable to those that do not claim ownership of land but have made historical use of the resources derived from it, include the following:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for

exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

It should be noted that in each instance the provisions do not just cite 'lands' but also 'territories' and 'resources' as the fulcra upon which rights rest. Given the State's obligations under these Articles, which have the force of domestic law as an agreed international obligation of the Philippines towards indigenous peoples, it should have

been incumbent on NCIP to have required that the company conduct a due diligence on local indigenous institutions, decision-making processes, social structures, cultural traditions, land uses and land claims. The government should also ensure that the company establishes and maintains systems to effectively manage ongoing interactions with indigenous peoples throughout the lifetime of the project. In the case of NCIP as well as other government agencies involved, such as the DENR, the DAR and the PCSD (Palawan Council for Sustainable Development), such due diligence was never demanded from the company, nor, evidence shows, encouraged by the government.

In essence then, indigenous peoples' rights were simply not seen as part of the equation by government agencies, since planting was said to be taking place on individually privately owned 'idle land', despite the fact that the Palaw'an interviewed by the researchers all claimed that the land on which the oil palm was planted was used by them on various occasions for swidden farming, the collection of medicines, as a source of weaving materials, root crops and other emergency food supplies, bamboo for construction and other purposes, and sometimes for honey collection. Indigenous peoples in Iraray II also stated that they now have to move farther afield to carry out their swidden farming because of the dangers posed by fire to the oil palm plantations. Such a variety of uses for the land targeted by Agumil belies the assumption that the land was 'idle', even if the latter day title-holders of that land assumed that it was.

Of further concern with regard to FPIC was the view of a PCSD staff member that it would simply not be possible for the company to enter any land covered by an Ancestral Domain Title as, according to him, the titles were required for collateral on the start-up loans made by Landbank to the out-grower cooperatives. This is inaccurate as Landbank has made clear that its loans do not form any kind of encumbrance on

the land title and that loans for palm oil are not collateralised by land title. However, Landbank does ask to hold the land titles to prevent land being sold or 'pawned' after it has been subject to planting with oil palm, as the plantation of oil palm requires a 25 year agreement to market the FFB through the borrower-cooperative and Agumil/PPVOMI.

Having said that, it is true that PCSD might not be expected to know the details of the loan agreements, but it is reasonable to expect PCSD to understand the extent to which timberlands, HCV lands and biodiversity in general are going to be impacted by the development of oil palm plantations. At the time of interview, PCSD had no maps of overall oil palm plantations in Palawan, and neither did the DENR. PCSD, as stated previously, seemed to have washed their hands of the matter, despite the potential effects on biodiversity already reported by growers, non-growers and indigenous peoples alike. The Council, like NCIP, simply maintains that it cannot interfere in the choice of crops that farmers choose to grow on their farms. This is ironic given that it seeks to control a whole range of other land use activities.

The PCA (Philippine Coconut Authority), also the agency responsible for vegetable oils in the Philippines, stated that it had no comprehensive maps of the extent of oil palm plantations, as did the DAR, even though the Provincial Agrarian Reform Officer (PARO) had recently assured a Board member of Landbank⁴², who happened to be a previous Under-Secretary of DAR, that all CLOA holdings subjected to oil palm planting were legitimately titled. Given the supposed absence of such mapping, it is hard to ascertain the basis upon which the PARO gave this assurance. His statement also contradicts the view of the NCIP provincial officer who said that 'some of the private land claims appear surprising.' Despite this statement by the NCIP provincial officer, there have been no steps taken by the provincial office of NCIP to investigate such claims.

Consultations and information-sharing

As far as can be ascertained from growers, local indigenous communities and barangay officials, a series of 'consultations' were held with communities invited to participate in oil palm planting. However, when asked to describe these meetings participants stated that they were animated by all the positive information and the way the economic benefits of oil palm were pitched, such that there was almost no discussion of any possible negative impacts. In particular, participants pointed out the lack of discussion concerning wider social or environmental impacts, or on the impact of turning their land over for such a long period if the financials did not work out as planned. One community stated that they had heard many promises of material benefits, but little of the other possible impacts of palm oil. To this extent, the initial introduction of the project appears to have involved a lot of so-called 'propaganda' in favour of planting oil palm and much less by way of an objective assessment of the full implications of participating in oil palm planting.

There is also no evidence that any social, cultural, economic or environmental baseline studies or impact assessment have been undertaken either before or since the establishment of the plantations. This is not to say that all the impacts are negative, indeed there are some indications that they are not. But neither are there grounds for asserting that all impacts are positive. On the other hand, there are clear grounds for saying that communities must have found it near impossible to make an informed decision.

Land use surveys were not conducted in a participatory manner and no records of participatory land use mapping were available to growers or communities. At the same time, it appears that the focus of discussions on oil palm planting was with the title holders of land, and there was little understanding that these owners may not have always been the primary users of the land.

When communities were asked whether they had their own records of the meetings held between them and company officers, they stated that they did not. Communities were clear in stating that a number of municipal officials and Landbank staff were persuasively in favour of the project, rather than adopting a stance that was open to the questions and doubts that the communities may have had.

One condition to enter oil palm production was that title holders join local cooperatives. In some cases, these were existing, but moribund cooperatives, and in others they were new cooperatives. In the formerly moribund cooperatives, such as the Malalong cooperative in Pulot Interior, this has meant that non-growers still retain membership of the Board whereas the cooperative's only active business is the production of palm oil. Members stated that some of these Board members have been taking advances from the cooperative. This may be illegal, and also indicates shortcomings in the maturity of the cooperatives and monitoring failures by both Landbank (as the main lender to the cooperative) and the Cooperative Development Authority (CDA) as the main regulatory body of cooperatives.

Furthermore, the management challenges of operating the cooperatives do not appear to have been explained to the putative members. In fact, Landbank officials stated that a number of the cooperatives and the plantations are now undergoing rehabilitation as a result of poor management and inability to pay back loans on time. When signing land lease agreements for the Anchor area, and production and marketing agreements for other areas, landowners reported not having access to any independent legal advice. It should also be noted that simultaneous with the signing of production and marketing agreements, a separate management agreement between the company and the cooperative was also signed. This allows the company to take over management of the oil palm plantation at its discretion and to charge a fixed fee

of 10% of all inputs as a management fee. Late payment of the fee also incurs a 14% compound interest charge. Again, communities received no independent legal or technical advice on this agreement and were presented with it in conjunction with the production and marketing agreement as a 'take it or leave it' combination.

The existence of such an agreement to be signed in conjunction with the agreement to devote their land for 25 years to oil palm, and to market all produce through Agumil/PPVOMI, indicates that the company already knew it would have to take over all aspects of production from the outset. The cooperatives, nevertheless, state that they were not made aware of the challenges of running the venture and therefore failed to understand the implications of dedicating their land to palm oil production for a period of 25 years. The Management agreement is for a period of 10 years or until the cooperative has paid off its Landbank loan. Given the fact that both Landbank and Agumil/PPVOMI are now talking of a period of plantation and cooperative rehabilitation, alongside processes of loan restructuring, it is clear that the management challenges, as well as the challenges imposed by the current global economic situation were not foreseen by the financiers or the company, let alone the growers.

In terms of the environmental impact of oil palm, it is clear that neighbouring farmers see oil palm as having major impacts on the productivity of their crops, especially coconut. The widespread brontispa beetle affliction was repeatedly cited by coconut farmers as having been caused by the oil palm plantations. Growers and non-growers alike stated that they were never informed of any such risks by the company. While many of them directly blame the company for importing the brontispa beetle, there is no evidence that the infestation did not come in through imports of ornamental plants rather than oil palm. What matters, however, is the impact that oil palm has had on the population of brontispa and

on its tendency to quickly traverse terrain from one area to another. Fortunately, the company has now resorted to the use of pheromone traps to deal with brontispa, and the PCA has reportedly been assisting with a fungal predator of brontispa.

Exercise of priority rights

Under IPRA, indigenous peoples have priority rights in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains.⁴³ Should Indigenous Cultural Communities (ICCs)/indigenous peoples give their FPIC to any development activity, project, programme or plan to be implemented by any government or private entity, they shall have the following rights:

- a. The right to an informed and intelligent participation in the formulation and implementation of the project;
- b. The right to receive just and fair compensation for any damage or loss which may be sustained as a result of such a project;
- c. The right to benefit sharing and;
- d. The right to exercise visoratorial powers and take appropriate action to safeguard the rights of the community under the same contract.⁴⁴

The findings of this case study appear to show that consent of local communities was obtained on the basis of inadequate and insufficient information, which itself was partial in favour of the potential benefits of oil palm. There is no evidence that feasibility studies or Environmental and Social Impact Assessments (ESIAs) were carried out at the time of initial development or since, by either the government or the company. Furthermore, the signing of the management agreement simultaneously with the production technical management agreement is a violation of the right of local communities to manage their own land. No compensation has been received by local communities for the loss of their trees and other resources during land clearing for oil palm planting. The right to compensation, transparency and FPIC are the rights of

indigenous peoples under international law, and they are rights accorded to all communities where RSPO rules are followed. Unfortunately neither Landbank nor Agumil have signed up to the RSPO principles.

National standards being developed to improve the palm oil sector

The lead agency for development of the palm oil sector is the Philippine Coconut Authority (PCA), and under it the Palm Oil Development Office (PODO). As explained in Villanueva 2011,⁴⁵ the government has largely supported development of the palm oil industry by the private sector through policy proposals. The PCA on the other hand has held back from responding immediately to policy proposals, citing the need to protect the coconut industry. Apart from the PCA, other agencies that have monitoring responsibilities in terms of land use regulation and governance include DENR, DAR, NCIP and PCSD.

The oil palm plantations in Palawan were subject to the formal process for the acquisition of Environmental Clearance Certificates, but only at the insistence of Landbank. It is ironic that the primary lender to the project should have insisted on this when a special environmental law governs Palawan along with its corresponding implementing body, the PCSD, which exists precisely to govern concerns over environmental impacts, sustainability and biodiversity.

A Multi-stakeholder Monitoring Team (MMT) has been established for the Palawan oil palm plantations by the Palawan Palm Oil Development Council, but it does not convene regularly. Meanwhile, each government agency approached maintained that it had no maps of the extent of palm oil plantations on the island and no means of monitoring planting of oil palm. In the absence of such maps it is also impossible for the government to systematically determine the ownership,

elevation, cadastral status or prior land use of areas on which oil palm is being planted. National standards on oil palm development are minimal and revolve around three notions. First, that palm oil should be complementary to rather than a competitor of coconut. Second, that oil palm should only be planted in idle, unproductive or underdeveloped areas. And third, that the planting of oil palm should only take place where milling facilities are available or assured. Other policies stipulate that oil palm growing should be promoted through organised growers and that the government should coordinate further research on, and development of, the crop.

In terms of industry plans, these tend to be vague and somewhat ambitious declarations of intent at the national level, while more substantial planning seems to occur at the local level through local politicians who are able to assist in generating the support of national entities such as BOI, PCA, DENR and others. It is this approach that best explains the creation of the Palawan Palm Oil Industry Development Council (PPOIDC), an institution whose existence is symptomatic of weak and lacking initiative on the part of government bodies to effectively monitor and regulate oil palm expansion.

Palawan Palm Oil Industry Development Council

The Palawan Palm Oil Industry Development Council (PPOIDC) was established on 13th January 2004 to perform the following duties and functions:

- a. Formulate policies and plans for the development of the palm oil industry in the Province of Palawan and to recommend the same to the *Sangguniang Panlalawigan* (Provincial Council) for appropriate legislative measures, if necessary;
- b. Initiate research on palm oil development;
- c. Advocate the promotion and institutionalisation of the palm oil industry development in the Province;
- d. Encourage the investments and promotion of

palm oil industry development, particularly on the establishment of milling plants/refineries and seed farms;

- e. Monitor, evaluate and recommend measures in the implementation of the programs of the Provincial Government on palm oil industry development;
- f. Determine the areas suitable for palm trees plantation with the Province of Palawan;
- g. Perform such other duties and functions as may be necessary for the effective implementation of the Program.

The PPOIDC is mostly composed of government agencies, including the Governor and Vice Governor, Committee Heads on Agriculture and Environment and Natural Resources of the Sangguniang Panlalawigan, Provincial Officers of the PCA, the Provincial Environment and Natural Resources Officer (PENRO), the PARO, and representatives of NCIP, DA and PCSD. It is also interesting to note that there is no representation from civil society, except for Palawan State University, an academic institution, and PALCOUNT Foundation, Inc., a private stakeholder in the palm oil industry. PALCOUNT appears to have subsequently been replaced by PNNI. Landbank is now also a member of the PPOIDC.

Industry involvement in or action on the RSPO

PPODC is aware of the RSPO. There is a link to its website on the PPODC page, and it referred to in the Proceedings of the 6th National Palm Oil Congress held in Palawan in June 2009.⁴⁶ It is unclear, however, if there has been any subsequent action on the part of the PPODC to implement, or encourage members to sign up to, the RSPO guidelines on oil palm operations. The General Manager said that he is not aware if the company head office is in communication with the RSPO at this stage. Although Agumil is not an RSPO member, the company has in the past indicated its interest in joining this organisation.

Recommendations

In the light of the findings described in this study, the following recommendations are suggested:

1. Regulatory mechanisms must be put in place urgently to ensure that accurate monitoring of the extent of oil palm planting can take place. This should include monitoring of which lands are affected by the plantations, their legal status, and the rights of the peoples living on it.
2. The company should share all maps of oil palm estates and all cadastral surveys with the relevant government offices (*barangay* officials, Municipal Assessors, local, provincial and national offices of the DENR, PCA and DAR) AND with local communities (including but not limited to local traditional leaders and out-grower cooperatives).
3. The province of Palawan should reactivate its own Oil Palm Development Council and especially its Multi-stakeholder Monitoring Team (MMT), which should formally include both critics and supporters of the industry, including indigenous peoples' representatives and Civil Society Organisations (CSOs) and Indigenous Peoples Organisations (IPOs).
4. Communities recommended that the company prepare and disseminate regular news pamphlets and updates regarding the company and its operations.
5. Communities with reservations or questions over the impact of the industry must be provided channels of communication to speak out and the company should undertake regular dialogues with both critics and supporters of oil palm development.
6. Advocacy groups and CSOs should be free to undertake ongoing research and monitoring of both the social and environmental impacts of the industry and should be able to access accurate and updated data freely.
7. Freedom of association among labourers should be openly supported by both the government and the company. Workers should be enabled to form unions, associations or workers councils as they wish and should be free to enter into open dialogue and negotiation with the company.
8. The company should ensure that all out-growers receive their own copies of mill receipts at the time of FFB deliveries and ensure that the accuracy of weighbridge measurements are independently verified from time to time.
9. All field workers should have their own countersigned time records and any other contracts and documents relevant to their work.
10. Landbank should consider joining RSPO in order to better implement and strengthen its own principles and standards in practice.
11. Landbank should undertake social and environmental impact analyses of all potential projects and then subject these to independent review following financing. This could be achieved through existing bodies by signing up to the Equator Principles. Such analyses should include all stakeholders in the business and not be restricted to cooperative borrowers and their landholdings.
12. The province and the municipalities of Palawan where oil palm is planted, or where oil palm plantations are projected, should undertake comprehensive studies and forecasts of oil palm developments in their areas and incorporate results obtained in their respective development plans for open consultation with their constituents.
13. RSPO should consider inviting local and national governments to associate with RSPO and its principles.

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4. Ibid.
5. Amojelar 2011.
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10. FELDA started as a government mechanism to develop small owner cooperatives among rubber estates, then moved to clearing new land for resettlement and thereafter diversified from rubber into palm oil and other crops. FELDA then also moved away from cooperatives, reportedly because of a problem with 'free-riders' in the cooperatives. FELDA has holdings with 26 subsidiaries and holds shares in such areas as banking. It is also the owner of FELDA Global with interests in over 20 countries. FELDA has been held up by some as a model of rural poverty alleviation. It is RSPO certified. As of 2009, FELDA had developed over 9,000 km² of land. Eligible beneficiaries are solely restricted to Malays.
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23. Ibid.
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26. Social Watch 2007, Table A3.5.
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31. The municipal administrator of Sofronio Española, himself a Board Member of a growers' cooperative and an early and staunch advocate of oil palm, confirmed that, as a result of the interest in palm oil production, land prices in the municipality have risen from PHP 3,500 (USD \$85.4) per hectare in 2005 to PHP 10,000 (USD \$244.1) per hectare by 2011. Note: It is also ironic that Landbank should be the one supposedly financing these groups when it was Landbank too that acted as the government financial instrument to finance agrarian reform in these same areas in the 1990s. The researchers were unable to assess whether Landbank had tried to ensure that agrarian reform amortisations were paid off before lending to oil palm production in land previously included in the agrarian reform programme. However, it is well-known that, nationally, Landbank collections of agrarian reform amortisations have stuck at around 30%. Neither were the researchers able to

establish whether there had been a sudden rise in payments of amortisations following the entry of outside groups wishing to undertake oil palm plantations. In fact, Landbank informed the researchers that it was a different department of the bank that dealt with agrarian reform payments and therefore the amortisation status of land previously subjected to agrarian reform had not been considered in advancing loans for oil palm.

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9 Sarawak: IOI-Pelita and the community of Long Teran Kanan

Marcus Colchester, Thomas Jalong and Wong Meng Chuo

Introduction

The State of Sarawak in Malaysian Borneo is now one of last frontier areas for palm oil expansion left in Malaysia. With most available lands in the Peninsula already planted and most of Sabah already leased out, in Sarawak expansion is accelerating and is estimated to be taking place at some 90,000 ha per year. The State already has over 920,000 ha and the Minister for Land Development has plans to double this area to two million ha by 2020. About half of this expansion is taking place on lowland peat soils¹ and the rest in the once-forested interior where most land is the ancestral lands of the indigenous Dayak communities.² As previous studies have shown there are numerous land disputes between Dayak and oil palm companies throughout the State, and many of these disputes have been taken to court. Although the courts have repeatedly ruled in favour of the Dayak and found that the Sarawak Government's

limited interpretation of 'native customary rights' is faulty, the State persists in handing out concessions in further violation of communities' customary rights.³

This case study looks in some detail at oil palm concessions granted in 1996 to a local joint venture company Rinwood-Pelita on the middle Tinjar river in northern Sarawak which overlaps the customary lands of communities of the Berawan, Kayan and Kenyah peoples. The local enterprise was acquired by the Malaysian transnational palm oil company, IOI, a prominent member of the RSPO, in 2006.

The case is especially important as it not only reveals the complexities of law relating to customary rights recognition in Sarawak but also exposes the problems with four parallel systems of dispute resolution that are at play, including: the company's procedures; the national courts; the RSPO's grievance procedure and; the RSPO's Dispute Settlement Facility. Despite all these efforts, the dispute remains unresolved, 16 years later.

■ *Early stages of land clearance / Bruno Manser Fonds*





Land, forest and rivers

Physiographically, Sarawak is divided into three broad regions: the coastal lowlands, an alluvial, slow-draining and peat-forming coastal plain; an intermediate region of undulating and broken hill country, ranging up to about 300 metres above sea level; and the mountainous interior which extends to the border with Indonesia and reaches up to 2,400 metres at Mount Murud in the north-east.⁴ Dulit Land where IOI-Pelita oil palm plantation is located belongs to the intermediate region, intercepted by the Tinjar River and its tributaries, including Sungai Bok.

Sarawak has a climate which is typical of the humid tropics. Mean air temperatures range from 26 to 35 degrees Celcius. The majority of the country has mean annual rainfall of 3,000-4,000 mm and humidity is constantly high. The climate is dominated by the North East Monsoon which starts in November and lasts till March. Inland, the rainfall between March and October is relatively light at 120 to 150 mm per month.⁵ Excepting the occasional

■ *Residents of Long Teran Kanan insist on their rights to their customary areas / Bruno Manser Fonds.*

prolonged droughts or excessive rains, the average rainfall pattern provides near ideal climatic conditions for growing oil palms.

The Tinjar river is one of the main tributaries of the Baram river and flows through originally rainforested, hilly lands before joining the Baram river some way below the mouth of the other major affluent to the Baram, the Tutoh river. Named after a local princess, according to local legend, the Tinjar descends steeply from the Usun Apau highlands between the Baram and Rajang river systems flowing into the Baram and so to the South China Sea.

The IOI-Pelita licences have been allocated in the foothills of the Dulit Range, a range of hills composed of Miocene limestone, which rise as high as 1,460 metres and run for about 50 kilometres along the south bank of the Tinjar river.⁷ These hills used to be almost fully covered with dipterocarp forest, before logging took place in the



■ *The Tinjar, where the IOI-Pelita oil palm plantation is located, is one of the two major affluents of the Baram river.⁶*

1970s, although the lower forests have been worked over through low-intensity indigenous systems of rotational farming by the Berawan since at least the early 20th century and by the Kayan since the 1960s, mainly on pockets of alluvial soils and hill slopes near the river banks. Only in the 1980s, when Kenyah moved into the area and began to plant cocoa as a cash crop did cultivation move further uphill away from the river bank to more hilly lands.⁸ Before the establishment of the oil palm plantations, despite the fact that the primary forests were logged over, a major part of the communities' forests remained intact for hunting and gathering purposes.

The peoples

Sarawak's population has always been ethnically diverse. The interior remains home to a large number of indigenous peoples, referred to as 'natives' since the colonial era, and now more commonly referred to as Dayaks, who are now mainly Christian having converted from animist beliefs in the last few generations. Along the coast, the area is mostly populated by Malays, and others like the Melanau and

Visayas, who have adopted Islam. Upland Dayaks have practised low intensity, rotational forest farming for several hundreds of years, mostly along the margins of the rivers and streams which, before roads were built, provided the main arteries for trade and communication. Typically, Dayak settlements are situated on the banks of a navigable river and comprise a single longhouse, a very long building traditionally suspended a few feet above the ground on pillars to maintain cleanliness and avoid flooding. Each longhouse is made up of a series of near identical family 'rooms', under a single long roof, fronted by a shared veranda where meetings, rituals and public life take place, and backed by each family's cooking and cleaning rooms.

These shared communal dwellings, made up of numerous economically independent families, are regulated by common consent through customary laws and traditional institutions. Each longhouse owns a defined village territory, with well-known boundaries, within which individuals and families acquire their own lands by first opening them up to cultivation. Family-owned lands remain in the hands of the family which first cleared them until and unless long abandoned in which case the lands revert to the communal ownership of the village as a whole. Farm lands and forest fallows are heritable being passed, more or less equally, to both sons and daughters remaining in the village, as need arises.⁹

The long term association of the Tinjar river with the Berawan people is noted in the earliest records.¹⁰ The customary chief (*penghulu*) of those Berawan now living in the disputed area claims indeed that the Berawan are among the first peoples in Sarawak, that they have been there for hundreds maybe thousands of years and were the first people to settle the Tinjar, having been in the area prior to the Brooke Raj.¹¹

According to their own oral history, the ancestors of the people now living in the disputed area used to live in the very headwaters of the Tinjar in Usun Apau,

the highlands between the Tinjar and the Rajang river system to the south. They lived at a place called Paong and then at other village sites known as Long Kuling and Long Lamat, from where they moved down to Long Batang, then Long Tisam and Long Miri, quite near to their current location.

We moved around a lot because of concerns about diseases or attacks. We moved from Long Miri because many people died there.

As recalled by the current *penghulu*, the Berawan moved from Long Miri to their current site Long Jegan before 1915. They still hold a copy of an official letter dated from that time, proving that they were already there. Today, Long Jegan is a community of some 1,000 people living in two locations about a kilometre apart, with 76 rooms (*bilek*) in the longhouse down by the river and another 24 rooms in a second longhouse slightly further up the hillside.

The Kayan, who now make up the majority of the community of Long Teran Kanan, which is about 20 minutes by motorised canoe downstream from Long Jegan, recall that before they moved there they had been living on the upper reaches of the Baram river. In the late 1920s, they were living at Long Kalimau from which they moved by stages to Long Utun where they were during the Japanese occupation. From there they moved to Long Na'ah also on the Baram. In about 1954, they moved to Long Kasih but they had problems farming there as the area was very low-lying and so prone to flooding. They then moved temporarily to the lower Tinjar and by the 1960s were at Bok Batu opposite Long Peking but this area was also prone to floods. It was about this time that the majority of the community converted to Christianity.

Jok Ajeng, one of the oldest residents of Long Teran Kanan recalls the District Officer (DO), who was British, staying the night in their long house at Bok Batu where they explained their problems with the floods. The DO advised them to move

upriver to the Berawan area. As Jok recalls, they negotiated several times with the Berawan before finally settling at Long Teran Kanan and a boundary between the lands ceded them and the Berawan was agreed.¹² Recalls another resident:

When we moved here there was no one living here except the Berawan upstream at Long Jegan. Of course, when we decided to come here our leaders and some of the community consulted with the Berawan regarding our intention to come and live here. After getting consent from the villagers we also approached the *penghulu* who also gave consent, as did the District Officer in Marudi. Letters were given in black and white. These are the letters we used in evidence in the court case.¹³

In 1980, some Kenyah long familiar with the Kayan and some intermarried with them also settled in Long Teran Kanan and more of them migrated to the village in 1981 and 1982. The majority of these Kenyah had come from Long Jeh on the Baram river. Kenyah we interviewed noted that, unlike the Kayan who have a very riverine orientation, they have always been more disposed to live in the upper rivers and deeper forest. So when they settled in Long Teran Kanan and finding that the majority of the easily available farmlands close to the Tinjar and tributary creeks were already cultivated and owned by Kayan families, they expanded their farms further up in the hills, facilitated by the network of logging roads that already criss-crossed the area. Some of these farms were up to two hours walk inland from the community.¹⁴ At that time, the 1980s, the government encouraged them to plant cocoa on their farmlands and the logging roads provided them with easy access to markets downriver in Lapok and then by boat further downstream. Some of the Kenyah recall that they also planted quite a number of fruit trees, including durians.¹⁵

Although the Kayan had invited and welcomed the Kenyah into the community of Long Teran Kanan, the Kenyah were aware that the lands they were expanding into really belonged to the Berawan. The



■ *Old photograph showing a Kenyah ceremonial dance attended by the Berawan penghulu. It was at this ceremony that permission for the extension of Kenyah land was affirmed by the penghulu*

penghulu for the Berawan advised the Kenyah that if they wanted to use the Berawan's lands they should settle in Long Jegan, but the Kenyah recall that they replied 'regardless of where we are, we are your subjects and will help you any way we can.'¹⁶ According to the Kenyah, this tributary labour for the Berawan *penghulu* continued for several years but ceased when he died, some four years ago.

In addition an agreement ceremony was held by the Kenyah, attended by the Berawan *penghulu*, which confirmed the agreement for their use of lands in the expansion zone. It was about this time that a permanent road was made into the community which encouraged further expansion of cash crops. Consequently, as the Kenyah admitted, both Kenyah and some Kayan did expand their crops beyond the area agreed and the Berawan again remonstrated with the community

of Long Teran Kanan. There were further discussions and another boundary was agreed in 1991, which runs near to the site of the present IOI-Pelita field office. This second agreement was formalised in the form of a letter signed between the Kenyah of Long Teran Kanan and the Berawan of Long Jegan.¹⁷

However, the Berawan we interviewed claim that the Kayan and Kenyah have since then expanded their farms even beyond this boundary. Our interviews reveal that there do remain disagreements about the exact sequence of events and how much land was ceded to the Kayan and Kenyah, but all parties admitted that there are overlapping land rights and claims, which they need to sort out. The complex web of rights created by this long history of inter-ethnic relations is thus not without its problems. Most interviewees concede that there are overlaps in the land claims of different parties, both between the Kayan and Kenyah of Long Teran Kanan and between them and the Berawan of Long Jegan. However, the main point that interviewees also stressed is that all the area in question is Dayak customary land.

The State and the administration of land

What is now the State of Sarawak had earlier, at least along the coast, been ruled by pre-colonial Malay polities that acted as trade-based entrepôts which derived their wealth and power from their control of the regional trade, notably between China and the Middle East, supplemented by the local production of exotic products from the surrounding forests and seas, for which the Malay sultanates depended on forest and seafaring peoples. These coastal sultanates had evolved over some two thousand years ‘an amalgam of indigenous, Hindu-Buddhist and Islamic ideas’.¹⁸ Administrative interference in the affairs of upriver communities was minimal.

Under the Brooke Raj, the overall philosophy of the paternalist but not very avaricious State was to curb inter-tribal warfare, improve community welfare, manage natural resources and protect the rights of the Dayak peoples from exploitation.¹⁹ Thus, although Residents and District Officers were appointed to oversee inland areas, the authority of traditional leaders was affirmed and customary law prevailed, although some efforts were made to regularise ‘native courts’ and even to codify customary law. As detailed elsewhere,²⁰ these norms of governance were continued without great change when power was transferred first to the British colonial government in 1946 and later to the independent Government of the State of Sarawak, as part of the Federation of Malaysia, in 1963.

As a result, Sarawak still has a plural legal system whereby native custom is recognised and upheld in the Constitution. The customary authorities of village heads (*tuai rumah* or *tua elocat*), regional chiefs (*penghulu*) and paramount chiefs (*pemancha* and *temongong*), are also recognised by the Sarawak Government and receive a small stipend for their services in maintaining the rule of law, both administrative and customary.²¹

With respect to land, the situation is more complicated. On the one hand, the successive administrations have recognised customary law, upheld customary rights (‘Native Customary Rights’ (NCR)) and sought to protect natives from land markets and takeover by outsiders. Hence so called Native Customary Areas and Native Customary Lands are not open to purchase by non-natives. On the other hand, governments have also sought to limit shifting cultivation, decried the perceived wastefulness of traditional systems of land use and thus sought to restrict the extension of NCR. The long-term goal has been to encourage natives to settle down, acquire land title and thus free up land for development by other interests.

The 1958 Land Code, the key piece of colonial law which continues to regulate land in Sarawak, thus explicitly sought to limit the extension of NCR. Surprisingly this controversial law was passed without significant discussion in the legislature.²² The law set a cut off date, 1st January 1958, after which no new native customary rights could be accorded without permit. Moreover, the same year, an administrative circular was issued instructing District Officers not to give permission for the felling of virgin jungle, thereby further restricting the extension of rights.²³ However, such permits were issued in some districts right through the 1960s.²⁴

Since the current chief minister Taib Mahmud came to power in 1981, his Government has made extensive changes to the Land Code and other land laws to support its policy of promoting large-scale commercial land development. Taib’s new creation, the Land Custody and Development Authority (LCDA), was explicitly designed to bring Native Customary Land into the sphere of commercial land development.²⁵ To get around the restriction on acquisition of native customary lands, the LCDA was accorded legal personality as a ‘native’. Moreover, the Land Code (Amendment) Ordinance of 1994 broadened the scope for the resumption of land by the government.

Section 46 thus enabled the government to resume land, not just for public purposes, but in order to make the land available for large-scale private land development.²⁶ In 1996, the Land Code was again amended to allow the Director (Lands & Survey) to extinguish native customary rights over a given area by issuing a directive in the Government Gazette and one newspaper, exhibited at a notice board of the district office, with 60 days to submit a claim for compensation. The burden of proof with respect to NCR was placed on the native claimant against the presumption that the land belongs to the State.²⁷ And in 1998, a further Amendment allows the state cabinet to make rules for the assessment of compensation payable for the extinguishment of native customary rights.²⁸ It is these laws which have so complicated the IOI case, as detailed below, as they apparently give the State the power to unilaterally extinguish native customary rights in favour of private sector land development.

The Administration's increasingly restrictive interpretation of NCR has long been contested not only by the Dayaks but also in the courts. In line with international human rights laws and the common law legal traditions which Malaysia took over from the British, the Malaysian Courts have repeatedly found against the Government (both in Sarawak and in the Peninsula) and affirmed that NCR derive from custom and endure so long as they have not been explicitly extinguished through due process of law and fair compensation.²⁹

A further complication which needs mention is that through the promulgation of the forestry laws, also periodically amended, the State has given itself increasing power to set aside lands as Forests of various kinds. In 'Forest Reserves', no customary rights to land can be established or exercised, and pre-existing rights in these area are thus subject to extinguishment, through due process of law and compensation. In 'Protected Forests', on the other hand, limited rights of access are allowed. 'Communal Forests' are reserved for the use of a particular local community.³⁰ The forestry laws also give

the Forest Department the power to issue licenses for logging, as well as to revoke Communal Forest by a process of notification in the government Gazette.³¹ Consequently rather than extending Communal Forests to encourage community forest management, the Communal Forests have been progressively reduced since the 1960s.³²

Administration in the Tinjar

The communities in the Tinjar have had a long interaction with the administrative apparatus of the State. Since the early years of the 20th century, when the Brooke Raj began to extend its authority over the Baram and its upper tributaries, administrators have overseen settlements, approved community plans to relocate their longhouses and intervened to resolve disputes between communities. As noted above, and as elucidated in detail in the court proceedings summarised below, the Residents in Miri and District Officers in Marudi, were closely involved in the decisions of the Kayan and then the Kenyah to relocate from the Baram to the Tinjar and to settle at Long Teran Kanan, and they made sure that the Berawan were consulted and approved the moves.

Moreover, as the court judgment on this very case and mentioned below also highlighted, the Administration gave ample other indications, even incentives, to the community so that they accepted their presence in the area. They local Administration provided Long Teran Kanan with a school, a clinic, assistance with water supplies, agricultural subsidies and other services.

In 1951, a large part of Dulit Land was gazetted as the Bok Tisam Protected Forest. Interviewees recall that in the late 1960s there were discussions with forestry officials about the legality of their presence in the area, but in the end they were allowed to remain, while more recent elocates, such as an Iban settlement near Lapok, were moved out. As one Kayan resident noted:

When we first moved into the area we got approval from the government and since then the government has provided a school and subsidies for agricultural development and other facilities like rainwater tanks. This reflects their recognition of our presence here, so we can't understand why they then gave our land to the company and now are appealing the judgment. This we cannot accept. We want our lands meaningfully recognised and respected.³³

The companies move in

Through procedures that are opaque to us, the status of the area as a Protected Forest was lifted and the area opened up to logging in the 1970s. Interviewees in Long Jegan recall that Rimbunan Hijau and another company, Rich Venture, began logging their lands in the 1970s.³⁴ Interviewees down at Long Teran Kanan recall a logging company called Bok Tisam Timber operating in their area. The community negotiated with that company 'which agreed to pay us a commission for the timber extracted, so we agreed to it. It did not create a great problem as we had enough farmland and hunting and fishing was still alright.'³⁵

In 1996 and 1997, LCDA (Pelita) in a 30:70 joint venture with Rinwood Sdn Bhd acquired Provisional Leases for some 7,840 ha of land, including the two lots which have been contested, named as Lot 3 and Lot 8 totalling 3,024 ha. The leases were granted by the Lands and Surveys Department, following the filing of required documents including an Environmental Impact Assessment (EIA), which was approved by the Government. Later the company secured an additional 2,200 ha, apparently without the required EIA, increasing its total holding to 9,040 ha. The two lots at the centre of the land dispute are located within the Dulit Land District on the left bank of the middle Tinjar River, at Tajong Teran, Sungai Metegai and Long Teran Kanan. Long Teran Kanan is about 120 kms or three hours drive by four wheel drive from Miri, the capital city of the Division.

When the community heard that the company had secured a lease on their lands, some community leaders approached Rinwood-Pelita and sought assurances that their crops and farmlands would not be affected. However, the company then began to develop its palm oil estate apparently without further consultation with the communities and without compensating farmers for the loss of their lands or the clearance of the crops which included cocoa, rubber, pepper and other crops.³⁶ The first that the community knew what was going on was when the bulldozers began clearing their cocoa and durian trees.³⁷

There were actually no dialogues. They never approached us about their intention to open up our land for plantation. They came in and straight away started opening up our lands with their machines...

The community went to see them and inform them, and said they were not happy by the way the company had come in and they said they did not want the company to affect their lands. But the company did not respond: they ignored our request. They went ahead and opened up our lands, our farms and private lands, where we had many fruit trees.³⁸

Recalled the Kenyah headman:

Some of the womenfolk really cried when they saw the destruction.³⁹

Other villagers recall that efforts were made to stage peaceful protests but these also were ignored. They also took their concerns to the Lands and Survey Department, the District Officer and their elected political representative but to no effect. That is when they took legal advice and decided to take their case to court (see below).

Because there did not seem to be any concrete response to our concerns, we pressed ahead with the court case. We did not want to be branded as anti-government just because we tried to protect our land. The government never wanted to look into the problem.⁴⁰

Some farmers notably the Kenyah, who farmed further inland than the majority of the Kayan, recall losing extensive areas of cocoa farms to the company.⁴¹

All my plants were bulldozed by Rinwood in the 1990s. I had about 3,000 cocoa trees which were cut. There was no real consultation. Sometimes they just bulldozed on Sundays when there was no one around as people were in church. Some people did get compensation but others did not. Like me, I got no compensation.⁴²

The company continued to expand its operations. By that time, we were told, a number of community members had planted their own oil palms in their remaining farmlands and some recall tense encounters with company personnel. In one case, one farmer recalls, company personnel came accompanied by 'mafia types' and told him to move off his land, threatening that they would burn his house and oil palms if he did not give way. The following day, despite being challenged by thugs on motorbikes, he went to the local police station. But he reported:

of course they [the police] could not do anything, they just belong to Rinwood and are not supporting us, so I went to see the SAO in Bakong. He also could not settle this case and said go to Lands and Surveys.⁴³

Another Kenyah who had secured a job with the company also found they were expanding operations onto his lands. When he objected, company personnel reportedly told him:

We can promote you if you surrender your lands. But I replied, 'I do not want your promotion. This land is very important to me'. Then they threatened us with police and gangsters. We replied that it seems you have not come in good faith but have come as a robber with no intention to work with us for our benefit. We refused to give up an inch of our land. I was dismissed [from employment] the very same day.⁴⁴

In group discussions, women emphasised that the damages resulting from the operations had not only meant the loss of cash crops but had also caused a loss of rice fields. Access to medicinal plants had been reduced and water courses polluted. They also noted their concerns about careless use

of pesticides, with used containers being left around and not properly disposed of. Small water courses where women used to collect small fish, snails and other products, some of which they used to sell, have also been badly affected. 'There used to be many of them, but the streams have been badly affected by the tractors'.⁴⁵

In September 2006, Rinwood-Pelita was acquired by IOI Holdings (see box) and registered as IOI-Pelita Plantations Sdn Bhd. As part of its due diligence in acquiring the property IOI took note of the fact that the affected communities were disputing Rinwood-Pelita's Provisional Leases in the courts.⁴⁶ The company took legal advice allegedly from the ex-Attorney General for Sarawak who reassured IOI that the communities' claims were without foundation.

Some changes in the local company's approach may have resulted from IOI's takeover of Rinwood-Pelita. However even before IOI's acquisition of the company, Rinwood-Pelita had been settling claims with quite a few members of the community.⁴⁷ After IOI took over the procedure seems to have been modified. The company continued expanding its plantations within the two estates up until 2009. It claims that it paid compensation to customary owners for as much as 300 ha of land.⁴⁸ Ceremonies were reportedly carried out both at Sejap (Lot 3) and Tegai (Lot 8) while these compensation payments were handed over.⁴⁹ Community members interviewed during this study noted that the compensation paid was quite minimal (between US\$ 50 -130 per ha) and corresponded to the crops and improvements on the land not for the land itself, while those receiving compensation were pressured to not try to reclaim their lands. IOI-Pelita did not settle claims to the much wider areas previously taken over by Rinwood-Pelita and is also accused of having cleared other forested lands which were collectively owned by the community and of importance as water catchments and for the collection of forest products.⁵⁰

IOI Corporation

IOI as it is commonly known was incorporated on 31 October 1969 as Industrial Oxygen Incorporated Sdn Bhd. It is one of Malaysia's larger home-grown business conglomerates which started off as an industrial gas manufacturing enterprise. It ventured into property development in 1982, followed by oil palm plantations in 1985. As of June 2009, IOI Group employs more than 30,000 personnel of more than 23 different nationalities in 15 countries.⁵¹ Over its 30 years of existence the company has diversified into a large transnational company with interests in plantations, property development, investment and manufacturing. Its acquisition of the Dutch refining company Loders Croklaan also gives it direct entry to the food industry including the retail and manufacturing ends of the palm oil supply chain in Europe, while IOI Edible Oils also manufactures processed palm oil products in Sabah.⁵²

The Group's pre-tax profit of RM 2,863.6 million for FY2011 was 12% better than the previous year whilst net earnings improved by 9% to RM 2,222.9 million. Plantation division earnings were up 33% at RM 1,497.8 million.⁵³ The Group is currently headed by Tan Sri Lee Shin Cheng, the executive chairman, listed by Forbes in 2012 as the 4th richest person in Malaysia and worth a reported US\$5.2 billion.⁵⁴ Lee and his family's control of IOI Corporation is held via Progressive Holdings Sdn Bhd. Although all of Lee's children work for the company, sons Dato' Lee Yeow Chor and Lee Yeow Seng are given more prominence as seen in their representation in IOI Corporation Berhad board of directors.⁵⁵

Plantations are IOI's biggest income generator, making at June 2009, about 65 per cent of the conglomerate's profits. The group operates 152,000 ha of oil palm plantations in Malaysia and 83,000 ha in Indonesia. In Malaysia, IOI has 12 palm oil mills with total milling capacity of 4.1 million tonnes per year supplied mainly from its 80 estates.⁵⁶

IOI is a long-standing member of the Roundtable on Sustainable Palm Oil. To date, seven of the Group's mills and associated estates have been awarded the RSPO compliance certification, comprising 40 estates covering 50% of the Group's planted area. The Group is also pursuing certification by the International Standard for Carbon Certification (ISCC). The ISCC System GmbH Certification supports lower greenhouse gas emissions and the use of sustainable biomass products. To date, two of the Group's estates and palm oil mills have been certified under ISCC.⁵⁷

In September 2006, IOI acquired the shares from Rinwood Oil Palm Plantation and the JV company was renamed IOI Pelita Plantations Sdn. Bhd. IOI acquired 9.1 million shares or 70% equity interest in the JV company for RM 21.3 million cash. In this venture into Sarawak, IOI Group executive chairman Lee Shin Cheng promised 'to bring in its superior planting materials, expertise, best practices and technology into RP Miri's plantation while at the same time ensuring greater environmental sustainability.'⁵⁸ As of 29th February 2012, IOI Pelita Plantations claims to own a gross area of 9,040 ha with a planted area of 4,269 ha, barely enough to supply a single medium-sized mill.⁵⁹

Court proceedings

In 1997, after efforts by the community of Long Teran Kanan to persuade the company to withdraw from their lands had failed, the community, represented by four named plaintiffs, filed a case in the High Court in

Miri against LCDA (Pelita), Rinwood and the Government of the State of Sarawak.⁶⁰

The community sought a judgment:

- recognising their customary rights over their lands, which should not be impaired by the government

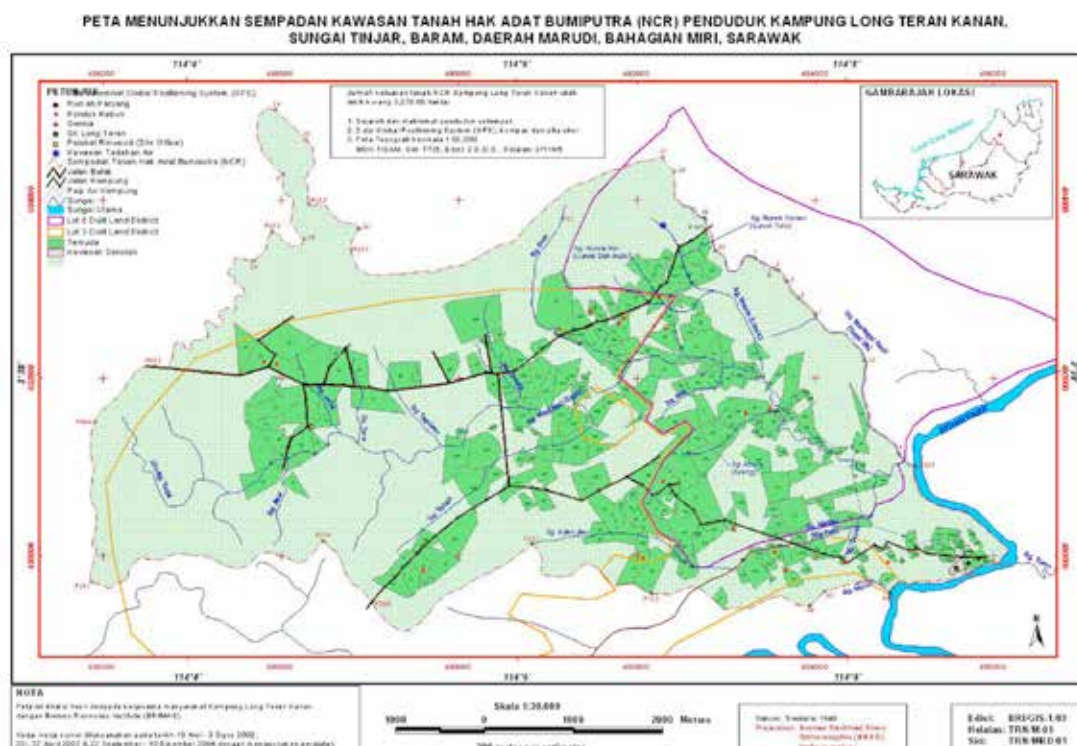
- make a judgment, which was only finally given on 25th March 2010.⁶¹ Consistent with other judgments from the Malaysian courts and the guarantees in the Malaysian Constitution to life and property, the judge ruled that the community of Long Teran Kanan does indeed hold Native Customary Rights to the area claimed, that their rights to these lands have not been extinguished, that the provisional leases issued over the land are therefore null and void and the company is trespassing. The judge also ruled that the company should pay exemplary and aggravated damages and costs.

They also sought a directive from the court to the Department of Lands and Surveys to cancel the lease, give vacant possession to them as the customary owners and to issue injunctions against the company to cease its operations and stop entering the communities' lands. They also sought exemplary and aggravated damages from the company and payment of legal costs.

Despite the urgency of the case, as the company was already at that time beginning to clear lands and establish its plantations, the court took over 12 years to

In making this judgment, the judge recognised that the members of Long Teran Kanan had acquired rights in the area through a traditional transfer of customary rights from the Berawan of Long Jegan. He found that the community had been given very clear reasons to believe that its presence was accepted by government officers, who had agreed to their settlement at the site and who had subsequently established a school and a clinic in the village and provided agricultural subsidies for the residents to develop crops on their lands. Their rights were therefore acquired in ways consistent

■ Map accepted by the court showing the lands of the community of Long Teran Kanan. Collective lands are shown in pale green and family farms in brighter green: the total areas accepted by the judge as customary land is 3,279 ha.



with the Sarawak Land Code. The judge also ruled that even though the area had been declared the Bok Tisam Protected Forest in 1951, this had not extinguished the Berawan's prior rights, which were later transferred to the Kayan and Kenyah.

The judge also noted that the government had accepted through its endorsement of the company's 1996 Environmental Impact Assessment, which the company had given a legal undertaking to follow, that the community of Long Teran Kanan should be compensated for any lands lost to the plantation and should be allowed to stay in the area. Such compensation had not been provided. The judge was explicit that the company therefore had 'no right to enter, clear or develop or occupy or to remain' in the disputed area.⁶² All these elements of the judgment are consistent with international human rights law which recognises indigenous peoples' rights to the land they have traditionally owned, occupied or otherwise used.

Controversially and falling well below the RSPO standard, the judge did, however, uphold the right of the State to issue leases and extinguish rights without according the people 'the right to be heard'. Even more controversially, considering that these circumstances were largely the result of the tardiness of the court to reach a judgment, the judge decided not to issue the requested injunctions against the company on the grounds that the company had now 'undertaken the development of the claimed area'.⁶³ Instead he ruled that the company should provide compensation to the communities for damages to their lands and crops and for the losses incurred since 1997 through being deprived of the use of their lands.

Despite its ambiguity, the judgment was widely celebrated by NGOs and in the press. The Borneo Resources Institute of Malaysia highlighted the inconsistencies in the government's approach noting that when the national oil company, Petronas, had built an oil pipeline across the same

community's lands, the Lands and Survey Department had compensated the customary owners.⁶⁴ Yet the same Lands and Survey Department has consistently denied that the same community has Native Customary Rights in its dealings with Rinwood-Pelita-IOI.⁶⁵

As for the Berawan of Long Jegan, there were discussions in 1997 that they also be a party to the suit against LCDA, Rinwood and the Government of the State of Sarawak but they chose not to be.⁶⁶ In 2004, the community of Long Jegan revised its opinion and decided that they did have a case. The lawyer representing Long Jegan then explored the option of a joint suit with the Kayan and Kenyah of Long Teran Kanan but this was felt impractical by the lawyer for Long Teran Kanan.⁶⁷ Accordingly, the Berawan of Long Jegan filed a separate claim against the company alleging that the operations of Rinwood-Pelita overlap some 2,800 ha of their customary lands. However, the case was later withdrawn as the map they had submitted outlining their customary area was considered not to be accurate enough as the basis for a land claim. According to the Berawan of Long Jegan, a revised map is being prepared with the help of a local indigenous organisation, and their case is to be reactivated.⁶⁸ The Berawan are claiming rights over most of what is now called Lot 3 (as well as some of Lot 8 and Lot 17)⁶⁹ of the IOI-Pelita estate. As no inclusive participatory mapping has yet been undertaken to clarify these matters, the extent to which the lands the Berawan claim overlap the lands recognised by the court as now belonging to Long Teran Kanan is unclear, although the lawyer for Long Jegan states that the overlap is minor.⁷⁰

Activating the RSPO Complaints System

Under the RSPO's Code of Conduct, producer members are expected to have a time bound plan for producing certified palm oil in compliance with the RSPO's Principles and Criteria (P&C). Recognising

that this may take some time but in order to prevent companies certifying model holdings while their other operations are in clear violation of the RSPO standard, the RSPO also has a Partial Certification Requirement:

- (b) a time-bound plan for achieving certification of all relevant entities is submitted to the certification body during the first certification audit. The certification body will be responsible for reviewing the appropriateness of this plan (in particular, that the time scale is sufficiently challenging), and verifying and reporting on progress in subsequent surveillance visits; *and*
- (c) *there are no significant land conflicts*, no replacement of primary forest or any area containing HCVs since November 2005, no labour disputes that are not being resolved through an agreed process and no evidence of non-compliance with law in any of the non-certified holdings (emphasis added)... Certificates for all of the company's holdings shall be suspended if there is noncompliance with any of these requirements.⁷¹

As an RSPO member, IOI is thus required to resolve the land conflict in IOI-Pelita in line with both the RSPO P&C and Partial Certification requirement before it seeks certification of any of its holdings.

It is important to note that representatives of the community of Long Teran Kanan and supportive NGOs had made repeated efforts to engage with IOI and its subsidiary IOI-Pelita to address the land conflict. Moreover, as early as July 2008, the lawyer representing the community of Long Teran Kanan conveyed the concerns of the community to the RSPO Executive Board. Noting that efforts were underway to settle their dispute with IOI-Pelita out of court, the lawyer proposed that a joint survey be undertaken to:

...determine the extent of their cultivated areas ie their gardens and farmlands within the boundary of the two areas of the provisional leases ie Lot 3 and Lot 8 Dulit Land District of IOI. My clients want their cultivated areas to be excluded therefrom. Additionally, they want compensation

from IOI for all the damages done to their land and crops. The lawyers for the State Government are all for an out of court settlement.⁷²

The case came back to the RSPO's attention by January 2009, when RSPO was asked to approve the certification of another IOI operation in Sandakan, Sabah. Invoking the Partial Certification requirement, NGOs contended that the operation in Sabah could not be certified because of the serious problems with IOI operations in Ketapang in West Kalimantan, Indonesia and the unresolved land dispute in Sarawak. The RSPO Secretary General thus engaged in a correspondence with NGOs supporting the community of Long Teran Kanan to try to clarify the relationship of the case to RSPO procedures. While it was recognised that there was a land conflict, the RSPO Secretary General contended that since a court case was underway this meant that a dispute resolution process was being 'attempted' and so certification of the operation in Sabah could proceed. The Secretary General conceded, however, that:

If, however, there are other claims which are not being resolved, either by direct negotiations or through court processes, then partial certification will not be possible.⁷³

The indigenous organisation, SADIA, clarified to the RSPO that indeed there were ongoing unresolved disputes, that land had been taken without Free, Prior and Informed Consent and that the community was still actively resisting planting. SADIA urged RSPO not to proceed with partial certification of IOI, as otherwise 'the mechanism/system (RSPO) will not be acceptable to the indigenous peoples'.⁷⁴ This issue was to rumble on for the next three years, and is still unresolved, but we can note now that RSPO still has no definition of 'significant land conflict'.⁷⁵

Between 2009 and 2010, RSPO Executive Board debated internally how it would address the problem. Some NGO members of the Board argued that it was clear that IOI-Pelita was in breach of the RSPO's

requirements under the P&C to recognise the community's customary rights and that IOI was evidently in violation of the partial certification requirement that there be 'no significant land conflict' in its holdings. On the other hand, company members of the Executive Board argued that IOI had 'done everything in its power to organise for a solution that is reasonable and mutually acceptable'.⁷⁶ The community continues to contest this assertion, feeling that its rights remain unrecognised.

In November 2009, community representatives and NGOs held a dialogue with IOI representatives during the RSPO's Round-table meeting in Kuala Lumpur in 2009.⁷⁷ A further meeting then took place in the IOI-Pelita estate office in Sarawak on 17th November 2009.⁷⁸ In this latter meeting, which included Berawan representatives, the community and the company agreed to settle the dispute through compensation and, according to the report of the independent auditor asked by IOI to facilitate the meeting, IOI made a 'commitment to dispute resolution through a process that is understood and accepted by all parties'.⁷⁹

The meeting minutes noted:

IOI promised it will not make an appeal if it loses the case. In addition, IOI gave assurance that even if it won the case, it will not simply grab the land forcefully, but will pay ex-gratia compensations to the respective persons based on the size of land and type of planted crops, and according to the compensation procedure that has been set up by Pelita.⁸⁰

Progress to implement this accord was, however, slow. In March 2010, the NGOs and community representatives again wrote to the IOI expressing concerns about the unresolved dispute and copied the RSPO Executive Board. This then formally triggered the RSPO Grievance Procedure.⁸¹ The court then issued its judgment on the case, as summarised above, confirming the rights of the community of Long Teran Kanan and also calling for settlement through compensation.

However, IOI, Pelita and the Government of the State of Sarawak then filed appeals against the judgment with the Miri High Court. On the 3rd April 2010, IOI issued a press release announcing its appeal.⁸² This was considered to be in bad faith by the NGOs and the communities, given that the company had given a firm undertaking to settle out of court. This prompted the communities and NGOs to file a detailed complaint direct to the RSPO Executive Board. Accordingly, a field study was carried out in August 2010 which was written up as a detailed report and submitted to the RSPO on 10th November 2010.⁸³

The RSPO had recognised the need for complaints procedures during the early definition of its standard. The RSPO's P&C make it a requirement of all RSPO member companies to have mechanisms to receive complaints and to resolve disputes through *mutually agreed* dispute resolution procedures. Likewise, the RSPO-accredited companies (so-called 'Certification Bodies') that issue certificates of compliance with P&C based on field audits are also required to have complaints procedures in case parties dispute the findings of audits. At the same time the Executive Board of the RSPO itself has been open to receiving complaints since 2007, but a formal Complaints System did not really become functional until 2010, at which time a Complaints Panel, comprising four members of the Board and one independent member, became active.⁸⁴

A first task of this Panel was to establish norms for the Complaints System. These were published on the RSPO website in early 2010 and set out the procedure by which the RSPO secretariat receives complaints, looks into the legitimacy of each complaint, if necessary contracting outside expertise to make assessments, and reports to the Board or the Complaints Panel, which considers the situation and makes decisions by consensus.⁸⁵ The Panel is currently chaired by the representative for Oxfam International. So far this Panel has received six complaints, of which the IOI case has been among the most testing.⁸⁶

The IOI-Pelita case was again considered at the June 2010 meeting of the RSPO Executive Board, which urged the company and the community to settle out of court.⁸⁷ However, there was a lack of progress in resolving the dispute. Acrimonious communications were exchanged in the press between NGOs and IOI and, despite a series of meetings,⁸⁸ there was a corresponding lack of progress in resolving the issue on the ground. In October 2010, IOI issued a statement claiming that it had met with community representatives and their lawyer but they did not clarify the damages they were claiming. IOI also highlighted the fact that the land claims of the community of Long Teran Kanan overlapped those of the Berawan community of Long Jegan.⁸⁹ On 13th December 2010, community representatives met with IOI staff and an IOI Board member to discuss a process for resolving the dispute, a meeting which at IOI's request was chaired by the Resident of Miri.⁹⁰ The community representatives met afterwards on the same day and agreed the compensation they were claiming. The claim was forwarded to IOI on 16 February 2011.⁹¹ However, although the company never formally responded to this compensation claim, it transpires that IOI-Pelita found the claim 'too excessive', which is why it declined to settle.⁹² Instead, it demanded a list of names of all the claimants.⁹³ In the absence of any substantive response to their concerns from either IOI-Pelita or the RSPO Complaints Panel, the NGOs and community signatories filed a further complaint to the RSPO President on 21st March 2011.⁹⁴

In view of the further complaint and the lack of progress with resolving the complaint, the RSPO Complaints Panel eventually considered the case in late March 2011. It issued a letter to IOI on 30th March 2011, a position which was endorsed by the RSPO Board the following month. A statement was then posted on the RSPO website which stated that the company was in breach of the RSPO Code of Conduct for members and the RSPO Certification System. The RSPO suspended the further certification of all IOI operations and required that

within four weeks the company come up with a solution to the problems raised in the complaints that would, preferably, be mutually agreed.

In response to this statement, IOI announced its willingness to reach an agreement and said it would work closely with the RSPO (although not with the complainants) to develop a plan to this effect.⁹⁵ For their part the community also made clear that they were open to a settlement as long as the company withdrew its appeal.⁹⁶ IOI did not withdraw its appeal, a matter the IOI Complaints Panel chose not to contest. It did elaborate its own proposal for resolving the conflict but, according to the complainants, the company did not approach the community to discuss this proposal. The proposal was released on 5th May and the company called a meeting in Miri to discuss it on 9th May. Community representatives attended but apparently no consensus was achieved. On 17th May the community asked that a follow up meeting be adjourned and that an independent mediator be appointed to put in place a mutually agreed process for negotiation.⁹⁷ Although we surmise that IOI did come up with a plan there is no copy on either the IOI or RSPO websites and we can only infer its contents based on NGO responses to it.⁹⁸ The lack of transparency in the process at this time was confusing to the complainants.

The community wrote to the RSPO on 18th May 2011 reaffirming its willingness 'to address the dispute through a mediated settlement based on the Miri High Court decision. Based on this, IOI must recognize out native customary rights, the pre-existing right to our land so that dialogue can be started.'⁹⁹ In its submission, the community set out very clearly how the community would like a settlement to proceed, which would include IOI Pelita dropping both its appeal and its other actions through the courts (see below). The community also stated that:

LTK [Long Teran Kanan] community is committed to achieving a long lasting resolution

that can be celebrated. The community wants to be a good neighbour to IOI Pelita and is willing to assist the company in obtaining RSPO certification. The community respects the Miri High Court judgment. LTK community would like an out-of-court settlement [to] result in a structured and institutionalized solution and it reiterates its willingness to negotiate and amicably settle the matters at hand out-of-court.¹⁰⁰

Informal communications between IOI and RSPO ensued, and RSPO also communicated with NGOs to ascertain their views. In July 2011, IOI filed a Revised Solution Plan with the RSPO, which was also not made publicly available but which was shared with the community headman.¹⁰¹ Under this plan IOI recognised that there were competing claims between Kayan, Kenyah and Berawan to the disputed lands. It agreed to defer its appeal while negotiations were pursued and to withdraw its appeal once a settlement was reached. It also invited the involvement of the RSPO's Dispute Settlement Facility (DSF).

The Plan also set out proposed terms for a two-stage process to be followed by the DSF mediator. In the first phase, the mediator would ensure agreement among the affected parties on a negotiation process including mutual agreement on the mediator, goals, scope, rules of engagement, representation and timelines. Once the mediator had established the basis for a negotiation, IOI proposed a sequence of actions to arrive at an agreement which would include participatory mapping¹⁰² to 'arrive at a jointly agreed list of disputed lands and the owners and users that potentially need to be compensated' and then final settlement through compensation and through other actions to address other community concerns, notably the environmental impacts. According to an article on the Neste Oil website, RSPO issued a further press release about the case in September 2011, but the press release has since been deleted from the RSPO website and it is not in the RSPO press compilation for 2011.¹⁰³

Further legal complications

What also becomes clear reviewing this dispute is that the High Court's contradictory judgment of March 2010 has sown confusion. On the one hand, the judgment had unambiguously stated that the company's leases were null and void, that the company was trespassing on the communities' lands and that it had 'no right to enter, clear or develop or occupy or to remain' in the disputed area. From the community's point of view therefore, it is clear that the company should vacate *their lands*. Yet at the same time the judge had declined to cancel the company's leases or issue an injunction preventing company access, giving the company grounds for arguing that it was not excluded from *its plantations*, so long as it proceeded to pay the required compensation. Adding to the confusion, IOI, Pelita and the government, when they had appealed the judgment had not asked for a 'stay of execution' (ie a suspension of the judgment pending the appeal hearing). This means that until and unless the appeal court rules otherwise, the contradictory situation introduced by the judgment prevails.

Frustrated by the lack of progress in getting compensation for their losses as ordered by the court in March 2010, a year after the judgment, in March 2011, members of the community began harvesting fruits from the companies' oil palms planted on the lands that the judge had clearly ruled belonged to the community. The company then alleged that the community was preventing its workers having access to its estates and filed several reports with the Marudi police alleging theft of fruits.¹⁰⁴ For its part, the community also filed complaints with the police against the company for trespass and for driving dangerously past the demonstrations. After several tense stand-offs¹⁰⁵ and in order to avoid further disputes, the company decided to withdraw its staff from the Sejai and Tegai Estates (Lot 3 and Lot 8).¹⁰⁶ In April 2011, the company filed for injunctions, which were granted by the courts, preventing seven named persons in the community from

entering their estates.¹⁰⁷ Since this did not appear to halt the harvesting of fruits by all of the community members, the company has since pursued contempt proceedings. These legal processes were still underway during our visit in June 2012.

RSPO Dispute Settlement Facility

In view of the difficulties being encountered by the community and company in reaching a settlement and responding to both the company and the community's requests for a mediator, on 26th May 2011, the Complaints Panel sought the assistance of the RSPO's newly established Dispute Settlement Facility (DSF).

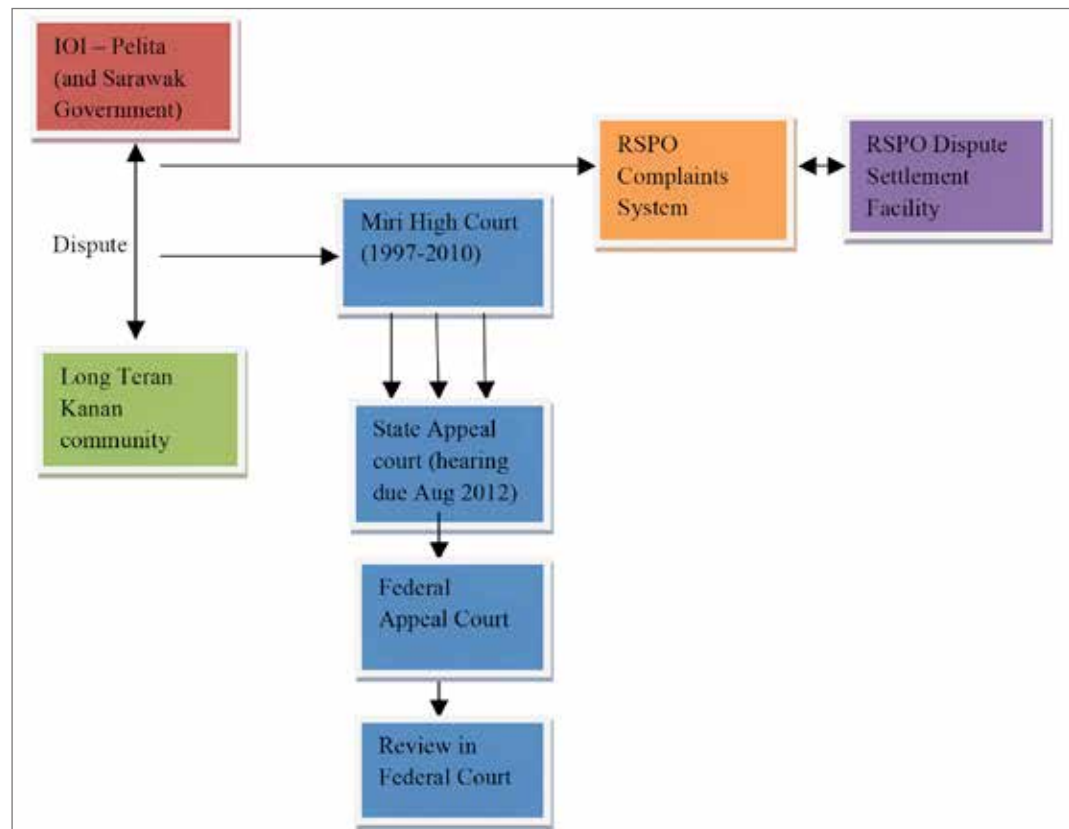
The DSF is an initiative promoted by several NGO and company members of the RSPO and later embraced by the RSPO Executive Board, which is designed to complement the

Complaints Panel and help RSPO members to resolve disputes. As noted on the RSPO website:

RSPO is seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a complaints process on fair, informed and respectful terms. Those who may face particular barriers to access can be provided assistance through the RSPO Dispute Settlement Facility.

The DSF had been set up to 'provide means for achieving fair and lasting resolutions to disputes in a more time efficient and less bureaucratic and/or legalistic manner [than making recourse to the courts], while still upholding the RSPO requirements including compliance with relevant legislation'. The DSF works to help companies comply with the relevant parts of the P&C related to dispute resolution and requires the mutual consent of all parties. The DSF thus seeks to recruit an approved mediator with suitable qualification who, acting in accordance with the RSPO standard, seeks to develop a 'dispute resolution process acceptable to both parties'.¹⁰⁸ In practice, the IOI case is

■ *Simplified diagram summarising the relationship between the different dispute resolution mechanisms in play in the IOI-Pelita case*



the first essay of the DSF process and so the procedures for the effective functioning of the facility are, in fact, still in development.

In July 2011, the RSPO contracted an Australian consultant with a background in conflict mediation to set up a negotiation process for the case. After holding a series of consultations with company and community representatives during October 2011, a mediation process was partially agreed by the company and by the majority of community members involved, which included a 'holding agreement' binding parties to certain actions while a final agreement was negotiated. This 'holding agreement' included:

- suspending actions through the courts
- monthly payments of money to the community for three months
- provision of services to the community in terms of road repair and transport for students and,
- in return, resumed access to the estate by the company for harvesting and plantation maintenance.¹⁰⁹

The mediator identified a list of issues in contention that would need to be resolved by means of the negotiation process but he also identified certain obstacles to the dispute resolution which included the fact that a minority faction within the community was unwilling to halt the harvesting of palm oil fruits. There was also a lack of agreement about how eventual compensation monies should be repaid.¹¹⁰ In the event, although IOI did ask the court for an adjournment of its appeal,¹¹¹ the ambitious terms of the 'holding agreement' were not acceptable to all parties and became an impediment to any negotiation even starting.

In January 2012, IOI wrote a letter to the RSPO, which was not copied to the complainants, summarising its views about the mediation process, in which it expressed the opinion that:

Given the fact that different groups have competing NCR [Native Customary Rights]

claims over the same pieces of land, it is impossible for IOI to negotiate with individual groups, for this will not diminish the conflicts as long as the fundamental question remains unanswered of the legitimacy of those claims.¹¹²

The company further stated:

Now that the situation on the ground has proven not yet ready for mediation, the company has no alternative but to return to the courts.

The company also stated that it was still willing to pay compensation to the original parties 'subject to them furnishing the relevant information and evidence.'

IOI is of the view that the RSPO grievance panel should review our current suspension.

In March 2012, IOI's lawyers wrote to the Miri High Court asking for the appeal case to be reactivated.¹¹³

In April 2012, alarmed by IOI's return to the courts, NGO complainants sent a further letter to the RSPO, which was endorsed by the community and copied to IOI. In a section of the letter titled 'RSPO's vanishing credibility', the complainants noted that they were dismayed and disillusioned by the way the RSPO's Executive Board and Grievance Panel had bent its own rules to accommodate corporate interests, and had 'stopped due communication and consultation with the complainants. After four years we are forced to conclude that RSPO's Grievance Procedure is compromised.'¹¹⁴

Following further discussions of the case at the Complaints Panel and at the RSPO Executive Board, on 3rd May 2012 RSPO issued a second public letter about the dispute. Noting the lack of a resolution but that in its view 'the mediation approach is not fully exhausted', the RSPO announced a six month period for the final resolution of the dispute. During this period the suspension of further certification would be limited to Sarawak only, allowing the company to proceed with the certification of its other

operations. It also recognised the continued willingness of the community to reach a settlement. The letter also 'requested' the disputants to follow an eight-point action plan which would address the obstacles to mediation and move towards a mediated solution.

The RSPO stated that, if after six months the parties had not jointly signed a time bound plan to resolve their differences, the RSPO would determine whether the community and the company had 'exhausted all reasonable communication efforts to sit around the same table and sign'. If it felt the community was at fault it would lift the suspension but if it felt the company was at fault it would suspend the certification of IOI's operations.¹¹⁵ On 7th May the community representative responded to the RSPO noting that the community 'is always ready for negotiation and looking forward for the Grievance Panel and DSF further step.' On 16th May, IOI also responded affirming its willingness to proceed along the lines suggested.¹¹⁶

Recent developments

In an effort to break the log jam, since May 2012 NGOs have used funds donated for conflict resolution from the Stichting Doen to recruit a consultant expert in palm oil to advise the communities on ways forward. An independent lawyer from Universiti Malaya was also contracted to assess the situation. There have been numerous visits to the community by various parties and concerted efforts to engage with the RSPO Secretary General and DSF.

The lack of progress in resolving the dispute had by then become a matter of public controversy in Europe. In December 2011, the Dutch news programme Zembla broadcast the findings from its own investigation of the situation, concluding that Oxfam, as Chair of the RSPO Complaints Panel, was responsible for the delays and was being unduly lenient to IOI.¹¹⁷ Oxfam was obliged to make a public statement

clarifying its role. Noting that the 'Panel also imposed an ultimatum of 6 months', Oxfam stated that '[S]hould a solution not be found before it ends, the RSPO will suspend all new applications of IOI for an RSPO sustainability certificate.'¹¹⁸

Interviews with the various parties during June and July 2012, suggest that despite all these efforts the situation has barely changed. The Assistant Manager for the IOI-Pelita operation says that IOI is still waiting for the lawyer acting for the community to furnish IOI with a full list of the persons to be compensated. He asserts that the community is still preventing IOI-Pelita from having access to the estate. So, 'to keep things cool', IOI has refrained from entering the disputed area since March 2011. The efforts of the DSF mediator having stalled, IOI is now waiting for suggestions from the RSPO on what the next steps will be. It is the view of local IOI staff that the March 2010 judgment leaves the company in possession of its estates and the 'natives do not have the right to the land. I think the natives were misled by the lawyer'. The IOI staff interviewed also believe that the demands of the community members are unreasonable:

They want everything. They want the land back and they want compensation. They want to take back all the estate properties, even the buildings.¹¹⁹

The company is therefore appealing the judgment on the grounds that as the natives accessed the area after the 1958 freeze on the issuance of Native Customary Rights, they cannot claim rights over the land. The IOI spokesperson asserted that the company would rather settle out of court but that it is not the only party to the case and both the Government of the State of Sarawak and Pelita are also parties to the appeal.¹²⁰ When we interviewed the appeal lawyer acting for IOI and Pelita, he noted that while a settlement out of court was possible there was no guarantee that all the appellants would withdraw their appeals. The State of Sarawak is represented in the case by its own lawyers.¹²¹

Conclusions and recommendations

Of course, we feel very bad and ashamed when we think of how we are treated by the government and the company. It has taken so long and still we have not received compensation for the losses incurred and we are still in a situation that is unresolved. (Kalang Anyi, Long Teran Kanan¹²²)

Persistent violations of the RSPO standard

The IOI-Pelita case is both simple and yet complicated. IOI, as a long-standing member of the RSPO and a member of its Executive Board, is bound to uphold the RSPO standard and the company is thus proceeding with the certification of its operations. The RSPO standard is explicit that it requires companies to respect the legal and customary rights of local communities. It requires respect for customary rights above and beyond what national laws and procedures may or may not require and it requires that no lands be acquired from legal or customary owners without their free, prior and informed consent.

It is obvious to any objective observer of this case that the Rinwood-Pelita operation, which IOI acquired in 2006, had been developed without respect for the Dayak peoples' customary rights and without FPIC. Moreover, after it took over the operation, although informed of the land conflict, IOI-Pelita chose not to respect customary rights and to dispute the claims of the local communities. To this day, IOI staff continue to deny that the communities have customary rights in the area and the company seeks only to compensate the communities for their losses of fruit trees and other crops. Even after the Miri High Court ruled in favour of the community of Long Teran Kanan asserting they that they do have NCR in line with the Constitution, the company has appealed the ruling. For a time IOI was persuaded by the RSPO to suspend its court action and seek an out of court settlement, a course of action it has repeatedly stated that it prefers,

yet it has now reactivated its appeal. It is clear that this appeal has become a major obstacle to any resolution of the conflict as it has sown mistrust and a feeling in the community that the company is acting in bad faith. The further legal actions against named community members for allegedly harvesting fruits on the contested lands has served to further inflame the dispute.

The IOI-Pelita operation is a Joint Venture company. Its operating partner LCDA (Pelita) is a State-owned enterprise. Although a minority shareholder (30%), Pelita has itself filed an appeal against the ruling, it continues to dispute the communities' customary rights and it evinces little understanding or knowledge of the RSPO or its standard. Neither Pelita officials nor its lawyer are able to provide assurances that the company would withdraw its appeal even if IOI chose to do so.

Although it continues to contest the legitimacy of the community's land rights, IOI-Pelita has been persuaded by the RSPO to seek a resolution of the conflict. Again the RSPO standard sets out very clearly the basis and procedures by which disputes should be resolved, and which must be followed when a company's 'right to use the land is legitimately contested by local communities with demonstrable rights'.¹²³ This requires *inter alia*:

- participatory mapping of the disputed area (not done);
- that necessary action has been taken to resolve the conflict (not yet done);
- that there is a *mutually agreed* and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties (not done);
- that the system resolves disputes in an effective, timely and appropriate manner (not done);
- that this dispute resolution mechanism should be established through open and consensual agreements with relevant affected parties (not done);
- that any negotiations concerning compensation for loss of legal *or* customary rights are dealt with through a documented system that enables

indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions (not done);

- that procedures are established for identifying legal and customary rights and for identifying people entitled to compensation (not done);
- that a procedure for calculating and distributing fair compensation (monetary or otherwise) is established and implemented (not done).

In sum, it is clear that IOI-Pelita Plantations Sdn Bhd is in serious violation of all these provisions of the RSPO P&C. The persistence of these violations should mean that all the company's certificates are invalid under the partial certification requirement.¹²⁴

Deficiencies of the RSPO Complaints System and Dispute Settlement Facility

The RSPO Executive Board has been aware of the land dispute between the community and IOI-Pelita since 2008 and the issue became a matter of contention over the Partial Certification requirement in 2009. Since the formal appeal to the Grievance Procedure in 2010, the RSPO, through its Executive Board, then through the Complaints Panel and with the support of its newly established Dispute Settlement Facility, has sought to encourage a resolution of the dispute. We have detailed the course of action taken, based on interviews and all the available information, as faithfully as possible.

Given that the dispute remains unresolved over four years since it formally came to the RSPO's attention, an inescapable conclusion is that the RSPO's procedures are both tardy and ineffective. The NGO complainants are also of the strong view that the Complaints Panel, heavily influenced by the Executive Board, has been unduly lenient to IOI.¹²⁵ It is hard to disagree. The RSPO delayed ruling on the violation of the partial certification requirement for over two years. Even when it did rule that the company was in violation, it only suspended *future* certifications and did not suspend existing certificates.

The RSPO Complaints System emphasises that 'Transparency should be the rule, confidentiality the exception'. However, our research shows that very few documents relating to this case are actually available or even logged on the RSPO website. Moreover, none of the documents issued by RSPO itself have been made available to the communities in Malay.

Another serious problem also emerges from this study. While the RSPO Complaints System and the DSF Protocol are explicitly aimed at ensuring compliance with the RSPO P&C, the advice and actions of both bodies, albeit unintentionally, have not made this explicitly clear in further communications with the various parties, including IOI-Pelita, the DSF mediator and the communities. It may be objected that the need for compliance with the RSPO P&C was obvious and understood by all. However, it seems that in fact this was *not* understood even by RSPO staff. IOI does not understand that it has to recognise rights based on custom. Pelita does not have knowledge of the RSPO standard. The community members interviewed were not informed of the most important required steps of an RSPO Dispute Resolution procedure (as bulleted above). Even the two stage process to start a negotiation proposed by the DSF mediator is not consistent with the dispute resolution process set out in the RSPO P&C. Arguably, even if the DSF had brokered an agreement between IOI-Pelita and the community of Long Teran Kanan, the company would still be in violation of the P&C, if it ever sought certification.¹²⁶

Our field interviews identified a number of further reasons why the initial mediation process under the DSF was not successful. The first was that contrary to the DSF Protocol, which requires that the costs of mediation be borne jointly by all parties, the RSPO Secretariat had arranged for IOI to pay the full costs of the mediator.¹²⁷ Consequently community parties were suspicious of the mediator's independence. Secondly, it seems that the TORs for the mediator were not widely discussed in the

community (although they were shared for comment with the headman), which compounded the community's sense that the mediation was one-sided. Thirdly, the mediator did not interview many of the NGO complainants and the lawyers representing the communities to ascertain their views. Finally, again, none of the RSPO and IOI documents relating to the case were translated into Malay, except the holding agreement, meaning that relatively few community members have been able to understand the details of what has been going on.

The RSPO is clearly important as an initiative that seeks to address land conflicts in a fair way by recognising indigenous peoples' and communities' customary rights, even where these have not been recognised under statutory law. The question arises, however, of whether the RSPO as presently constructed has the capacity to address land conflicts effectively. In response to the question whether the slow rate of progress by the Complaints Panel in dealing with this complaint was due to lack of resources, lack of clear procedures or a lack of consensus in the Panel, the Chair of the Panel replied that:

... it was in part all these things but it was also in large part due to a lack of capacity in the RSPO Secretariat so far to deal with complaints adequately. In my view, for the Complaints Panel to be successful the Secretariat eventually will need to be strengthened so that it has the capacity and skills to operationalise the procedure, in support and only referring key decisions to the Panel. Currently this capacity is not completely there and so the burden has been falling back on the Panel to move things on. The same is true of the Dispute Settlement Facility which really needs to be run in a way that is sufficiently independent of both companies and communities. To date, NGOs have largely had to fill in for the Secretariat in trying to make the DSF operational. So an improved flow chart, funding and procedures are by themselves necessary but not enough. There is a need to really build capacity and have the right number of quality people in the

RSPO Secretariat. There are also problems of lack of expertise in the Panel itself. I don't want to blame the secretariat but looking ahead in order (for the RSPO) to deal with an increasing number of these complaints constructively you can't rely on a bunch of volunteers on a panel. As Panel Chair I don't mind saying that we may have made mistakes or made judgments that were incomplete or even wrong, and maybe we have been too easy on the various parties, as a bunch of well-intentioned but volunteer amateurs. None of the members of the Panel is fully experienced in dealing with land conflicts and complaints like this.¹²⁸

For their part, IOI, Pelita, the DSF mediator and advisers to the DSF¹²⁹ have all laid the blame for the lack of progress with dispute resolution on the fact that there are divisions within the communities both about process and about overlapping land claims. These differences do exist as we have discussed above. However, emphasising this problem overlooks the more fundamental reason that progress has stalled which is that IOI-Pelita (and associated government parties) are refusing to accept that the communities have customary rights to the land. They are doing this through appeal to the courts and in contempt of the RSPO standard.

One final concern needs highlighting. The RSPO P&C make clear that companies need to respect customary rights and take actions to resolve disputes. The purpose of the Complaints System and DSF are to oblige and assist companies to resolve such problems. However the involvement of the RSPO and DSF does not mean that companies themselves are no longer expected to take active steps to resolve disputes. On the contrary, as the RSPO's letter of 3rd May 2012 makes clear, the company and the community were given a six month ultimatum to take steps to resolve matters. It is thus especially concerning that IOI staff imply they are now waiting for the RSPO to find a solution.

A number of recommendations flow from these findings and conclusions.

RSPO

The RSPO Executive Board, Complaints Panel, DSF and Secretariat must be clear that all actions taken by the palm oil companies and other parties must be in line with the RSPO P&C.

The RSPO must clarify unambiguously what constitutes a 'significant land conflict' for the purpose of Partial Certification and what must be done to determine that a dispute resolution mechanism is 'mutually agreed'.

Much more needs to be done to ensure full transparency regarding complaints, submissions and RSPO statements. This can readily be achieved in a way that shows the RSPO is openly accepting and sharing information from all parties without implying that the RSPO is partial or favouring any particular point of view.

All RSPO communications should be translated into the national language, in this case Malay, and both translations and originals made available to the communities.

The RSPO Secretariat must itself adhere to the DSF Protocol in contracting parties.

For this case, the DSF mediation needs to be restarted in full compliance with the DSF Protocol and strictly in line with the RSPO P&C to ensure the possibility that the end result is an operation compliant with the P&C.

The RSPO needs to maintain clear distinctions between the work of its constituent parts. The Complaints Panel must be more independent from the Executive Board to which it reports. It should conduct its deliberations without Executive Board interference and then make recommendations to the President for consideration by the Board. Likewise the Dispute Settlement Facility must be run independently from the Complaints Panel. The Complaints Panel should take account of the *outcomes* of the DSF process but not make surmises about the progress or otherwise of the DSF while the dispute remains unsettled.

More resources and qualified personnel need to be allocated by the RSPO to these elements – the DSF, the Complaints Panel and the Secretariat – for them to run effectively.

IOI-Pelita

IOI needs to ensure that its staff and senior management understand the RSPO standard. It also needs to train its minority joint venture partner, Pelita, about the RSPO standard and instruct Pelita to adhere to this standard.

IOI-Pelita must respect the customary rights of the local communities, instead of contesting their claims as it has now done for over five years.

IOI and Pelita must withdraw their appeals to the High Court.

IOI and Pelita must make clear that they accept that the communities have the right not to cede their customary lands to the company.

IOI must clarify who will represent IOI-Pelita in negotiations with the communities and who has the authority to make binding agreements with them.

Communities

The communities need to identify who is representing them in negotiations.¹³⁰

The various community representatives, including their attorneys, should agree a mechanism for resolving conflicting claims among the different Dayak families, groups and communities.

The communities need to clarify how compensation will be shared, taking into account that some lands are family farms and some lands are communal and taking into account that some parties have received partial compensation already.

Communities and company

Both parties should now progress through the steps for conflict resolution set out in the RSPO P&C.

This should include participatory mapping and agreement on these maps by all customary claimants through inclusive community consultations.

Negotiations should then proceed and should result in agreements on:

- compensation for damages including loss of income since 1997:
 - compensation for past losses and damages to family owners
 - compensation for losses and damages to collective rights areas and watersheds/drinking waters
- rehabilitation of affected watersheds and remediation for other environmental impacts noted in the original complaint and raised in subsequent discussions
- with respect to land, negotiations should explore a full set of options, including:
 - sale of lands to the company, which should be subject to community (not just individual) consent
 - of lands to the company, which should be subject to community (not just individual) consent
 - allocation of planted lands as small-holdings where land owners ask for that and agree with terms
 - return of lands where consent is not given.

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69. Moody International 2011:16.
70. Interview with Baru Bian, 10th July 2012.
71. RSPO 2007 at para 4.2.4. An amended Partial Certification requirement was adopted by the RSPO Executive Board without consultation with the membership on 3 March 2011. The revised text now reads: 'Land conflicts, if any, are being resolved through a mutually agreed process, e.g. RSPO Grievance procedure or Dispute Settlement Facility, in accordance with RSPO criteria 6.4, 7.5 and 7.6.'
72. Email from Harrison Ngau 28th July 2008.
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74. Ibid.
75. In fact, the Partial Certification requirement is that the phrase 'that are not being resolved through an agreed process' refers to labour disputes and not the, earlier mentioned, land conflict.
76. Email correspondence between RSPO Secretary General Dr Vengeta Rao and Executive Board members 4th – 6th February 2010.
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78. Grassroots 2010.
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80. BSi 2009:2.
81. The RSPO website logs the complaint as being activated on 17 March 2010. The RSPO 'Grievance Procedure' was later renamed the 'Complaints System'.
82. Grassroots 2010 Annex 3.
83. Grassroots 2010. Date confirmed by email by Andrew Ng of Grassroots, 15th July 2012.
84. The need for a complaints procedure first became apparent in 2006 when the RSPO was appealed to resolve a dispute between plantation workers and the Indonesian company Musim Mas. A formal Grievance Procedure was adopted by the RSPO Board in January 2007. For the next three years, complaints were handled by the Secretary General in liaison with the Board. An independent Complaints Panel was instituted in early 2010 and became effective from August 2010 (Johan Verburg pers. comm. 15th August 2012).
85. http://www.rspo.org/en/complaints_system_introduction
86. The complaint against IOI actually comprise two separate concerns, the first about the land dispute related to IOI-Pelita and the second about the environmental impact of IOI's operation in Ketapang, West Kalimantan, Indonesia. This study only examined the first part of this complaint.
87. There is no public record of this communication.
88. Moody International (2011:8) lists four further meetings between IOI and the communities or other parties on 7th May 2010, 10th November 2010, 13 December 2010 and 9th May 2011.
89. IOI 2010.
90. BMF *et al.* 2011:8.
91. Moody International 2011:8.
92. Moody International 2011:8. The report states that the community was claiming RM3.00 per tree per month for the 13 years that the company had been illegally in occupation of their lands. A verbally conveyed offer of RM 0.6/tree/year x 13 years was also considered 'still excessive and not acceptable' by IOI-Pelita (Moody International 2011:9).
93. BMF *et al.* 2011:8.
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96. Moody International 2011:16.
97. BMF *et al.* 2011:9.
98. RSPO also sent a letter to the parties on 4th May 2011 but a copy is not publicly available.
99. Letter from Kampung Long Teran Kanan to RSPO Secretariat, 18th May 2011.
100. BMF *et al.* 2011:10.
101. Julia Majail email 2nd August 2012.

102. Earlier in 2011, there had been discussions between the community and IOI about participatory mapping but these had not reached consensus (Eric Wakker pers. comm. 23rd July 2012).
103. <http://www.rspo.org/files/images/2011%20NR%20Report%20FINAL.pdf>
104. Moody International 2011:16.
105. Offor 2011a:3.
106. Interview with William Elevenson, IOI (Miri Office), 26th June 2012.
107. Interviews with communities and IOI, 23rd – 26th June 2012.
108. http://www.rspo.org/en/dispute_settlement_facility
109. Offor 2011a:1.
110. Offor 2011a and 2011b.
111. IOI 2012a.
112. IOI 2012a.
113. Kadir *et al.* 2012.
114. Letter from Milieudefensie and 14 other NGOs to RSPO dated 19th April 2012.
115. RSPO 2012a.
116. IOI 2012b.
117. [http://zembbla.vara.nl/Nieuws-de-tail.2624.0.html?tx_ttnews\[tt_news\]=62096&-cHash=062fe54f7f3619ef1f681732bce09235](http://zembbla.vara.nl/Nieuws-de-tail.2624.0.html?tx_ttnews[tt_news]=62096&-cHash=062fe54f7f3619ef1f681732bce09235)
118. Oxfam Novib 2012.
119. Interview with William Ellevenson, IOI (Miri Office), 26th June 2012.
120. Ibid.
121. Interview with KY Ling, 27th June 2012.
122. Interview of Kalang Anyi, 24th June 2012.
123. RSPO Principles and Criteria 2.3, 6.3 and 6.4.
124. RSPO, Certification Systems 4.2.4.
125. Letter from Milieudefensie and 14 other NGOs to RSPO dated 19th April 2012.
126. RSPO members are required to develop a plan for the certification of all their operations. However, under the RSPO Certification System, the unit of certification is ‘the mill and its supply base’. At the moment the IOI-Pelita operation in Tinjar lacks a mill and sells its fruit to another company, Rimbunan Hijau, which is not a member of the RSPO.
127. IOI paid these costs to the RSPO and the RSPO DSF contracted and paid the mediator. Email from Julia Majail, 2nd August 2012.
128. Interview with Johan Verburg of Oxfam, 9th July 2012.
129. Teoh 2012.
130. The authors advise that the community complainants consider involving the different factions within the Kayan group and ensure direct representation by the Kenyah. They should consider inviting the Berawan to observe negotiations.

Sabah: Genting Plantations and the Sungai and Dusun Peoples

10

Marcus Colchester, Thomas Jalong and Leonard Alaza



Of course, since there is a lot of oil that now comes from here and goes to Europe, or whoever it is being bought by, they should realise that the production of this oil by this company is causing us a lot of problems, as they have robbed us of our land and caused a lot of suffering. So, if they know the oil they buy comes from this company, then they should stop buying it. (Nanak Binti Andani, Napagang, 25th September 2012)

■ *Demonstration by Tongod villagers outside the KK High Court, 15th May 2012, with placards reading 'Don't seize our rights', 'Land for livelihoods not for profiteering' / Galus Ahtoi*

■ *Nanak Binti Andani, Napagang / Marcus Colchester*



Introduction

Sabah, at 7.4 m ha is the second largest and easternmost Malaysian State, lying at the northern end of the Island of Borneo, and has a long history of plantation agriculture. The promotion of plantations was the main economic project in British North Borneo in the 20th century, with a focus on crops such as tobacco, pyrethrum and rubber. Especially since the 1980s, a great deal of

land has been allocated to oil palm. By 1999, Sabah had 941,000 ha and by 2012, almost 1.5 million ha of oil palm had been planted. Mean yields per hectare are high and as more and more palm trees mature, production has



■ *Entrance to the Genting Tanjung Bahagia estate near Napagang. The signboard reads: 'BEWARE Private area – trespassers will be prosecuted' / Marcus Colchester*

been increasing rapidly, making Sabah the number one palm oil producing State in Malaysia. In 2011, Sabah produced some 5.84 million tonnes of crude palm oil,¹ over 11% of global production, generating 38% of the State of Sabah's revenues.

Sabah's forested interior has long been home to communities who still arrange their affairs and regulate access to land through their customary laws. Resistance to colonial impositions² and to the expansion of plantations has been a recurrent feature of Sabah's history, and while native customary rights have always been nominally acknowledged, the State's land laws, both during and since the colonial period, have been crafted with the express intention of freeing up lands for plantations.³

This study examines an oil palm plantation being developed in the very centre of Sabah by the Kuala Lumpur-based Malaysian company Genting, which has interests in real estate development, casinos, tourism as well as palm oil. Its subsidiary Tanjung Bahagia Sdn Bhd has opened up some

8,000 ha of lands with an associated palm oil mill on lands claimed by the Sungai and Dusun peoples of Tongod District in the headwaters of the Kinabatangan river. After unsuccessful attempts at dialogue with the company and appeals to the government, in 2002, the communities took their case to court. During the past 10 years, the case has proceeded laboriously through the hierarchy of high courts, appeals courts and the Federal Court but owing to sustained objections by the defendants the communities' pleadings have yet to be heard. The case exemplifies the tensions between the RSPO's voluntary standard, which requires respect for customary rights and the right to Free, Prior and Informed Consent, and the State's laws and land allocation procedures, which deny these same rights.

Land, forest and rivers

Sabah, famously the 'The Land Below the Winds',⁴ enjoys a humid, tropical climate relatively little impacted by the typhoons which sweep the East Asian seaboard. It is a mountainous and forested territory. On its western side, a narrow coastal plain rapidly rises up into the Crocker Range and the Mount Kinabalu massif, which are cut through by short torrents flowing westwards to the South China Sea. Going east of these

mountains, the major rivers flow over much greater distances down to the Sulu Sea and, for long reaches of their lower courses, meander through extensive lowland plains, once forested and now substantially cleared for crops.

The area selected for this case study is in Tongod District which lies east of the coastal ranges in the mountainous centre of Sabah and is the westernmost part of what is now Sandakan Division. It is an area of tangled hills and valleys, just east of the State's second highest mountain, Trus Madi, which rises to 2,642 metres. From these hills, the streams and rivers find their way down steep valleys to the eastern coastal plain. They first flow into the river Kinabatangan which in turn debouches into the Sulu Sea near Sandakan, for long the principal town of the State.

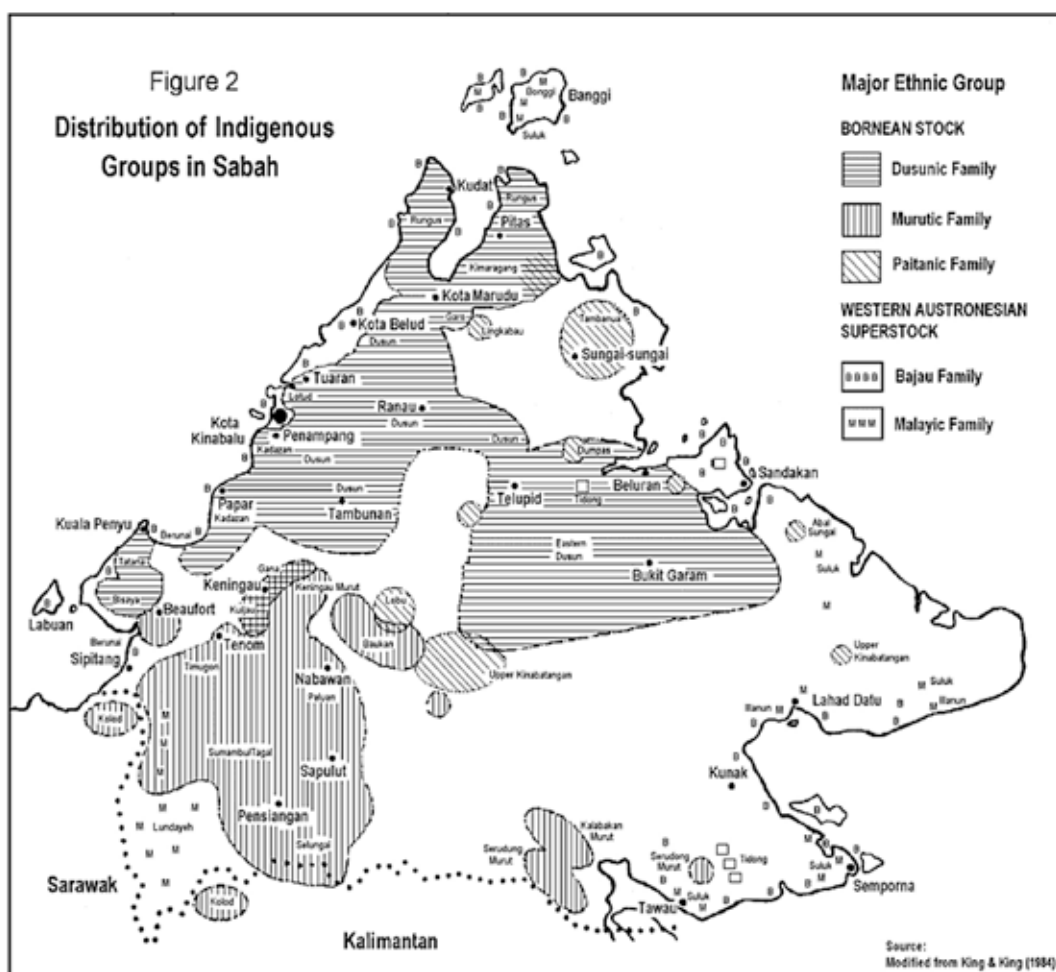
types, with much of the more accessible land being converted to farmlands and secondary forests, until recently the area retained substantial areas of primary forests, mainly lowland mixed dipterocarp forest, hill mixed dipterocarp forest and lower montane forest. The higher hills are also clothed with upper montane forest and summit scrub, and large areas have been set aside as Forest Reserves.

The peoples

Until quite recently, Sabah was relatively thinly populated. This is considered to have been the result of the area's heavy involvement in slave raiding from the 15th to mid-16th centuries.⁵ Sabah's population density was quite low at the time it was

Although the long occupation of the Tongod area has resulted in a mosaic of ecological

■ *Distribution of indigenous peoples in Sabah. (Source: Lasimbang and Nicholas nd)*



granted to the North Borneo Company by the Sultan of Brunei in 1881. Population grew from an estimated 67,000 in 1891 to 334,000 or so in 1951,⁶ a slow rate of growth attributed to high mortalities from introduced diseases. Thereafter the population began to expand much more rapidly due both to natural increase and immigration.

According to a study carried out for UNDP and based on the 2000 census, an estimated 39 indigenous groups now make up about 60% of the estimated 2.6 million total population of Sabah. They speak more than 50 languages and 80 dialects, with the Dusunic, Murutic and Paitanic groups the largest among them.⁷ This estimate includes peoples whose own traditions and histories link them to places outside what is now the State of Sabah.

According to available historical research, including a detailed analysis of local legends, the Upper Kinabatangan region, which this study focuses on, has been inhabited by groups ancestral to the area's present indigenous peoples since at least AD 1200.⁸ The area was close to the legendary ancestral home of many of the Kadazan and Dusun peoples, which bordered where many of the Paitanic speaking peoples, later to be referred to as Orang Sungai, also originated.

The peoples in the study area around Tongod still refer to themselves as Sungai and Dusun, being those who live along the larger rivers and those who live further up-country, respectively. These are generic terms used locally to refer to clusters of peoples who see themselves as ethnically related. The British referred to them all as 'Pagan Tribes' to distinguish them from converts to Islam, although among the Sungai the influence of Malay and Bajau downstream has been quite strong. Both the Sungai and Dusun of the Tongod area describe themselves as subdivided into numerous peoples or clans (*bangsa* and *kaum*) each with its own dialect, custom and area, although intermarriage between the groups is apparently not rare.

In Tongod, the subgroups of the Sungai people that are locally recognised are Rumanau, Makiang, Sinabu and Kalabuan and the subgroups for the Dusun are the Minokok and Mangkak. According to those interviewed, and indeed the earliest records, these peoples have been in the area since long before the British colonial era. The area remained a sparsely populated upland, which was never effectively under the jurisdiction of the coastal trading principalities and Sultanates but which may have suffered sporadic incursions of slave traders who supplied the pearl and sea cucumber fisheries of the Sulu Sea.⁹

Before the British introduced a formal hierarchy of chiefs, the Dusun and Sungai peoples did not recognise any authority above the level of the village headman.¹⁰ Villages, made up of clusters of family dwellings (the people did not live in longhouses like the neighbouring Murut or the Dayaks further south), tended to be located beside larger rivers (*sungai*) or small creeks (*susun*), and each had its own headman, chosen for his personal qualities rather than his ancestry.¹¹

According to the interviewees, both the Sungai and Dusun peoples assert rights to their hunting and gathering territories. The boundaries between communities are not marked but they are widely known, as these boundaries run along natural features, such as watersheds and stream courses, or were marked by prominent trees.¹² Within these village areas, the Sungai and Dusun give emphasis to the rights of individual families to their farmlands and to the secondary forests that they use for fallows and fruit trees. Any disputes about lands are settled through customary law, the emphasis being to fine violators more for causing a disturbance than for the offence itself. Customary law emphasises the importance of maintaining village harmony.

Under custom, land rights are passed equally to male and female descendants, and elders may make provisions to pass their lands to both their children and their

grandchildren to ensure their daily needs can be met. This customary system of land use, land ownership and inheritance retains its vitality to this day.¹³

Until very recently, these communities' connections with the outside world were by forest trail and canoes up and down the rivers. These remained the main means of communications right up till the 1960s, as Tongod in the headwaters of the Kinabatangan river, lies at the extreme western end of what became under the British the 'Sandakan Residency'. From the town of Sandakan, the colonial administration was only able to extend its influence into this remote area relatively late in the history of British North Borneo.¹⁴

The oldest resident of the area to whom we were referred is Martin Ambisit who reckons he was born in 1931 at a time his family lived up in Lelampas. In 1940 his family moved down to Mananam, where some of them remain to this day, although he himself moved to Sanam, near Telupid, in 1972. As he recalls from what he was told, the British had imposed a system of tribal chiefs (*panglima*) sometime before he was born. Their duties, as recorded by the British, were to oversee law and order, extract the head tax (of which the *panglima* were entitled to keep 20%) and recruit labour for keeping bridleways open.¹⁵ Martin can recall that during the Japanese occupation the *panglima* also visited to extract a tax of one and half dollars.

At that time people were mainly self-sufficient, living from hill rice grown in their shifting cultivation plots as well as crops like cassava, other roots and vegetables. They also hunted, fished and used the forests for many things, including gathering medicines. Their main source of cash income came from the sale of dammar resin and to a lesser extent rattan, which were harvested from the surrounding forests. The resin and rattan had to be carried to the navigable rivers and then taken downstream in canoes. There was an annual trade fair (*tamu*)¹⁶ held at Kuala



■ *Martin Ambisit is considered the oldest spokesperson for the community / Marcus Colchester*

Tongod, where they could exchange their produce for vital items like metal – which they could fashion into *parang* (machetes), spears, hoes, axes and adzes. By that time there were already missionaries active in the area and local people began to turn to them for medicines.

During the 1940s, a school was set up in Lelampas, and by the 1960s the first road was built through the area, about the time that the logging started. Forestry was important in Sabah in that period and Martin himself got a job as a silviculturalist working for the Forestry Department. His main task was to thin the forests of the less valuable timber species. Martin insisted that the British respected the natives in those days but admitted that they did not give the people any proof of ownership of their lands. The District Officers would make periodic visits but rarely came further upstream than Kuala Tongod. So, if you wanted a permit for anything you had to travel out. To get a permit for a shot gun you had to travel all the way to Sandakan and get one signed by the Resident.¹⁷

Although the road did cross some people's farmlands and caused some losses, it was welcomed for the links it provided to the outside world, so at that time nobody

objected to it.¹⁸ Once the road came into the area, the cash economy started to pick up but only slowly as no one had a vehicle and so they remained dependent on the rivers and foot travel for transportation. In the 1980s, however, people did start to plant commercial crops like oil palm, durians, rambutan and *langsats*, but even this had little impact on the forests and wildlife. Some animals even prospered as they liked the fruits: wild pigs and small deer were plentiful.

As Martin recalls, large-scale logging only started in the 1960s after Malaysian independence (1963).

In those days, although we did not have much to sell, we lived in peace on our own land and no one came to destroy what we have. There was no disturbance or encroachment, so we were satisfied with what we had. But then, in 2000, trouble came.¹⁹

Sabah land laws and Native Customary Rights

Underlying the ‘trouble’ that was to come from oil palm plantations is a long history of land administration in which the indigenous peoples’ rights to their lands, while respected in principal, were never secured in practice.²⁰

As lucidly explained in the works of Yale University scholar, Amity Doolittle, starting in 1885 the British commenced a process which, while recognising the principle that the native people had rights in land based on custom and their ancestral occupation of the area, encouraged the ‘settlement’ of land claims through the registration of individual lots.

Successive laws imposed greater and greater strictures on this registration process and even tried to set deadlines by which all land registration would be completed. However, the overstretched administration was never able to keep up with these ambitious schedules, as the remoteness of much of the interior, the limited infrastructure, the lack

of personnel and budgets and the priorities of the government never gave it the capacity to complete its task.²¹

The priority of the administration was to open up the most fertile and accessible land to plantations and so native land registration tended to be done just ahead of, or too often behind, the encroaching agribusiness frontier. The urgent matter then was to register each family’s farmed plot and then either facilitate compensation payment if the native could be persuaded to relinquish his land or advise the planter to leave these small cultivated areas aside.

Many of the officials posted to work with the native peoples realised that the land registration process was only addressing a small part of the native peoples’ ancestral rights to their wider village or ethnic territories. However, they never got around to recognising these wider areas either because recognising the full extent of the natives’ communally owned areas was too complicated²² or because they simply lacked the time and resources to reach this far. Nonetheless, the officials were fully aware that the natives did have rights beyond their areas of permanent cultivation, including to village communal reserves, to forest reserves, to lands used for shifting cultivation, to isolated fruit trees and so on.²³

Doolittle concludes that:

... the Company instituted a system of legal pluralism in which native customary laws were supported while those that hampered the commercial exploitation of land were replaced with western legal concepts.²⁴

She notes that the same problems that were common in the colonial period prevail today.

The largest obstacle to natives gaining title to their land in the 21st century is the very same obstacle that natives faced in the 1880s; large companies, working in collusion with ruling elite are able to place their claims in the forefront of the application process, overriding pre-existing native claims.²⁵

Land registration today

Following the regulations established in accordance with the Land Ordinance 1930 and the procedures adopted for the registration of claims by the Lands and Survey Department, native people seeking title to their Native Customary Rights (NCRs) have first to apply to the Assistant Collector of Land Revenue and, once processed, the claims are passed through to the Director of Lands and Survey for titling (or rejection). The process is necessary to ensure that there are no overlapping claims or tenures. The general view among native people in the State of Sabah is that this process of land registration is unduly onerous and expensive for the people to follow through. Moreover, it is extremely slow, as the Tongod case examined in more detail below also shows.

During 2012, the government and the Attorney General for Sabah have made statements to the press that, according to their reading of the 1930 Land Ordinance, no new NCRs could be asserted or recognised after 1930. The statement of the Attorney General made in early 2012, was repudiated by Anne Lasimbang of the indigenous NGO, PACOS Trust, who noted that it is the courts that have the authority to interpret laws, and they had nowhere stated that 1930 is a cut-off date for the creation of NCR land. She also pointed out that the British colonial

government had continued to accept NCR claims long after 1930 because colonial efforts to register all NCR land claims had never been completed.²⁶

More recently, the Director of Lands and Surveys Department has also made statements interpreting the 1930 Land Ordinance as a cut off date for NCRs. This position has likewise been contested by the Sabah Law Association (SLA). As SLA Chairman, Datuk John Skayun, is quoted as saying, ‘the Director’s views clearly do not represent the state of NCR law established in cases like Rambilin and many others’. He pointed out that the denial of NCRs to any claimants after 1930 would be likely to lead to manifestly unjust situations and lead to land conflicts. He highlighted the problem that in fact the majority of land applications are being made by companies, which on being approved by the Department ‘inevitably leads to a clash of vested interests between business interests and the livelihood and traditions of the natives’.²⁷

The arguments of the Attorney General and the Director of Lands and Surveys are peculiar as the Department of Lands and Surveys itself has been recognising NCRs, albeit slowly, long after 1930. Indeed, based

■ *Interview with community leaders, Jaafar Dorong and Lius Meliton / Marcus Colchester*



on the Department's own record, between 1997 and 2010, the Department registered 562 NCR land claims, of which 192 had been verified, 40 were not and therefore rejected, while another 328 cases are still under investigation and two cases were withdrawn.²⁸ In 2011, the Department began issuing communal title to NCRs.²⁹ Moreover in late 2012, the Department itself has just announced its intention to launch a mobile Native Customary Rights Fast Unit, which will visit communities to resolve outstanding NCR claims.³⁰

The statements of the Director and Attorney General are also in contradiction to the highest court of the land which, as noted above, has issued explicit judgments in favour of recently established NCRs in Sabah. The issue thus raises questions about whether or not there really is rule of law in Sabah or whether the government considers itself above the law. At the least, it is asserted, the government is in breach of its fiduciary duties to protect the interests and rights of the people.³¹

It is the view of some indigenous leaders, that the policy of the government to deny customary rights is bound to provoke more and more land conflicts. During the first decade of the 21st century, the Department of Land and Surveys was receiving over 40,000 applications for native title annually but was only able to process 12,500. By 2009, it is claimed that over 265,000 applications for native title remain outstanding.³²

Not all these claims made it into the official system, the main reason seems to be that:

Most native farmers, who cannot afford a private surveyor, must wait an average of twenty years, and up to fifty years, before the State surveyor makes it to their land to register their claim.³³

According to official records there are some 32,554 cases of unresolved land applications or land claims in the State of Sabah. Of these, about 2,000 are outstanding applications for the recognition of Native

Customary Rights with the Assistant Collector of Land Revenue.

As Doolittle notes:

This massive backlog of applications for land title lies at the heart of many current conflicts over native land rights. With such a large number of unsettled land claims, it is inevitable that overlapping claims for land are submitted and boundaries between lands never properly delineated.

The Islamic Association of Sabah notes that the blame for the lack of progress securing native land rights should not be laid on the administration. It notes that 'native land rights are almost gone because of political masters' decisions and not the Land and Survey Department or Forestry Department'... and it referred to recent land allocations whereby 'the natives and other Sabahans lost 906,330 acres to plantation companies [so] that 90 per cent of it now belongs to Peninsular Malaysia-based companies.'³⁴

The National Inquiry into the Land Rights of Indigenous Peoples carried out by the National Human Rights Commission, Suhakam, which reported in 2013, took detailed testimony from indigenous peoples and other experts in all parts of Malaysia. In Sabah, the Commission heard repeated complaints from witnesses that their applications for recognition of their Native Customary Rights were delayed. No fewer than 221 out of 407 witness statements fell into this category.³⁵ A further 88 cases were from complainants whose claims had been dealt with incorrectly.³⁶ The Commission heard of numerous cases of land conflicts being caused by the alienation of lands without a fair process and more than a quarter of the cases it heard related to plantations granted over areas encumbered with customary rights.³⁷ Apparently many companies were unaware that they were expected to themselves ensure the lands granted to them were first freed of native customary rights, even though this is expressly noted on their titles according to the Sabah Natural Resource Office.³⁸

Communal title

One of the consistent demands of the indigenous peoples of Sabah has been for an amendment to the laws to allow the titling of communal lands as a way of both securing the larger territories on which communities depend and strengthening their capacity for self-governance. On 10th December 2009, the legislature did adopt an amendment to Section 76 of the Sabah Land Ordinance, which allows the issuance of communal titles through a fast track method. It now reads as follows:

In cases where any State land planned by the Government of Sabah or a claim to customary tenure of land has been established or a claim to native customary rights has been dealt with by a grant of land and such land is to be held or is held for the common use and benefit of natives and is not assigned to any individual as his private property it shall be lawful for the Minister to sanction a communal native title for such land to be issued in accordance with the relevant provisions of this Ordinance in the name of the Collector as trustee for the natives concerned but without power of sale and such communal native title shall be held to be a title under this Part, but shall be subject to such rent as the Minister may order.³⁹

While the objective of the communal title according to the amended version is to overcome issues involving NCR in Sabah and to optimise native land development, many indigenous peoples organisations have rejected the new provision in the law. Far from protecting their customary rights, they argue, the law has been designed to give the State a controlling power over customary lands, whereas the communities are only treated as participants and beneficiaries in the title, not as land owners. Several land development schemes founded on this new provision of the law have now run into trouble. The National Human Rights Commission found that ‘communities affected by these projects describe them as top-down programmes with no consultations or consent-making mechanisms for the project.’⁴⁰

Notes Doolittle:

From the perspective of native people, it could be argued that the new communal titles are not full titles that recognise customary land rights. Instead communal titles can be seen as a way to control the nature of agricultural development on native lands and to limit individuals’ ability to make their own decisions regarding land development.... it could be argued that these communal titles are a very limited form of ownership that serves the State’s interest more than native peoples’ interest.⁴¹

Native title

Although successive governments have been tardy to recognise and title native peoples’ lands, it does not follow that all untitled areas are vacant lands unencumbered with rights and therefore freely available to be allocated to other interests. On the contrary, the Constitution of the Federation of Malaysia protects custom and the national legal framework follows English Common Law, which allows for the continued operation of customary law.⁴² The National Human Rights Commission’s recent National Inquiry into the Land Rights of Indigenous Peoples notes:

Native title arises out of native customs, and these customs, which define the content of native title, are part of the law of Malaysia and are protected under the Federal Constitution.⁴³

As Ramy Bulan, Associate Professor of the Faculty of Law of the University Malaya notes, in Sabah customary law is recognised so long as its provisions are not ‘inhumane, unconscionable or contrary to public policy’.⁴⁴

Based on these principles of law, the Federal Court has repeatedly found that customary rights in land derive from customary law and do not depend on grants by the State under Statutory law. This means that customary rights in land pertain and do so for so long as they have not been fairly extinguished by due process of law. In North America

and Australia these principles are described as 'Native title' or 'Aboriginal title'.

Two notable cases show how these same principles of law have been recognised by the courts in Sabah. In the case of *Rambilin Binti Ambit versus the Assistant Collector for Land Revenues*, the judge noted in 2007 that when Sabah was first ceded by treaty to the North Borneo Company in 1881, the company undertook that:

In the administration of justice by the Company to the people of Borneo, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding possession transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriage, divorce, and legitimacy, and other rights of property and personal rights.

The judge ruled that rights in land obtained under custom subsist unless extinguished and that persons can continue to obtain rights on State lands in accordance with custom. After carefully reviewing the full history of the land laws in the State he concluded that:

There never was and not even after the passing of the Land Rules 1913 any requirement that the natives would be required to obtain permission

to enter upon land before they can establish customary tenure or native right. Native rights were never subject to any permission of the Company not even the right to communal land which was governed by the customs of the community... the native customary right which included the right to enter state land for the purpose of establishing it still subsists until today.⁴⁵

In 2010, the government sought to strengthen its powers to take over lands for public purpose though the Land Acquisition Ordinance, but the requirement remains that the State must follow due process to ensure lands are first vacant and unencumbered with rights before they can be reallocated.

This principle was reaffirmed in the High Court in 2011 when it overruled the criminal prosecution of native persons carrying out shifting cultivation in the Kuala Tomani Forest Reserve. In that case the judge found that the natives could show customary connections to the lands while the State could not show it had lawfully extinguished their rights in establishing the reserve.⁴⁶ This is not an isolated case. On the contrary, the National Human Rights Commission found that forest reserves had frequently been imposed on customary lands without due process.⁴⁷

As at 2012, there were some 15 active cases related to Native Customary Rights before the High Court. As the government is contesting the recognition of NCRs, it is anticipated that all these cases will go through the full gamut of legal procedures all the way up to the Federal Court and Court of Appeal before final judgments are reached.

■ *Paulus Gahin is a member of the village committee in Napagang / Marcus Colchester*



Land administration in Tongod

As noted the British system of administration and the land laws of Sabah were all retained with little change after independence. In Tongod, it seems, awareness of the law and importance of regularised title to land came late as hitherto there was no pressure on their lands. However, once the road was constructed, Forestry Reserves were

declared and logging commenced (see below), the villagers became aware they needed paper proof of their land rights to deal with outsiders bearing licences.

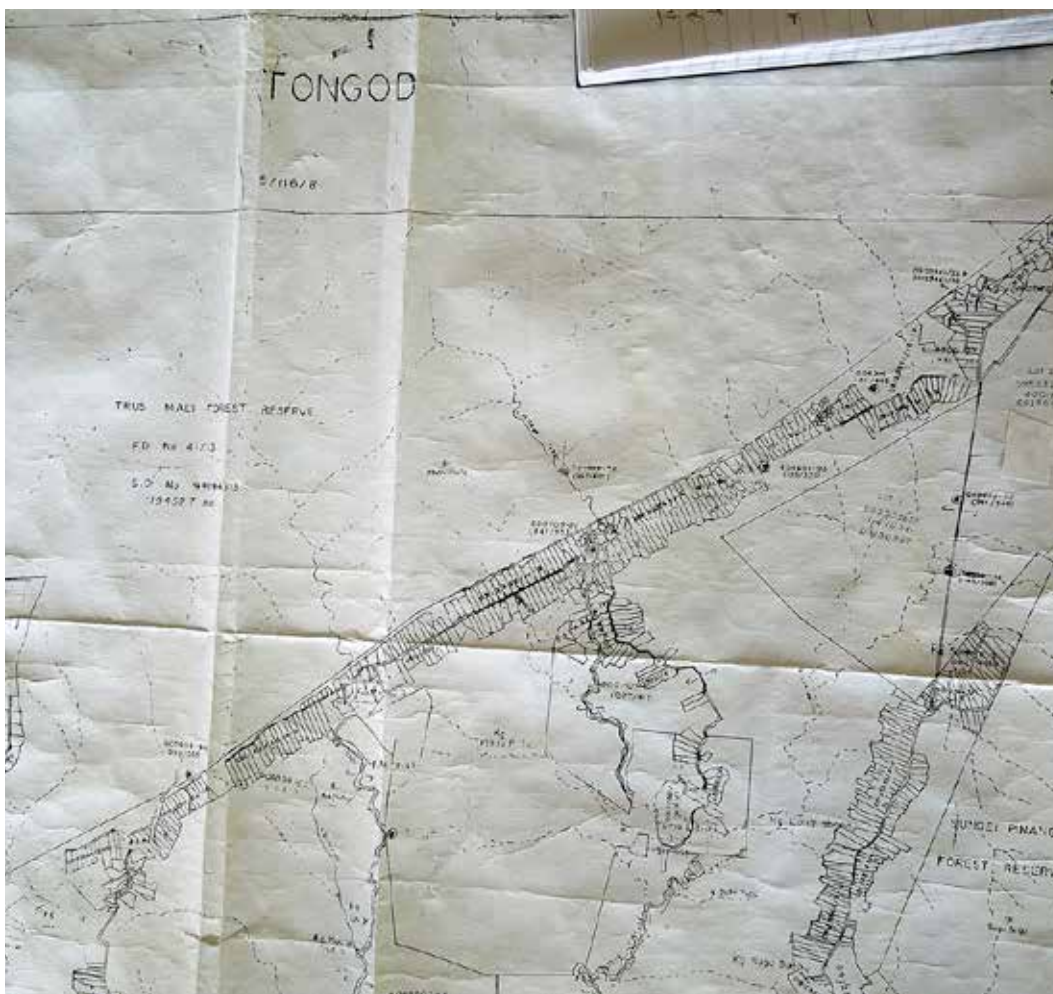
According to those we interviewed, community members began asking the administration for recognition of their customary lands in the mid 1970s. Most of the community members were by then beginning to develop cash crops on their lands and build more modern dwellings and they wanted land security. In 1984, in an effort to clear people out of the Forestry Reserves, the Forest Department began a process of resettling people, previously more spread out within their communal lands, along the roadsides. Houses were provided through the UNDP-supported community-forestry programme.⁴⁸ Although the convenience of the housing and the other services provided by the government are readily acknowledged by the villagers, they point out that although many of them have moved to roadside houses, some of them still retain their farms and farmhouses near their crops. The crops require quite intensive labour inputs and oversight, at planting, for weeding, to

scare away pests as the crops mature and, of course, at harvest time.

In retrospect the communities now think that their applications for land were dealt with in a very selective way, based not on their rights but on the convenience of government planners. Thus, while individualised 'native titles' did begin to be handed out along the road side, those applying for lands further into their communal territories were told to wait until the Tongod Regional Planning Study (TRPS) was put into effect. This survey which made some welcome promises to the local peoples to promote development based on their own ways of life, was however never put into effect. The communities were thus left waiting for a development programme that never came to fruition.

This situation prevailed right up until 1997, when the new administration abruptly announced that the TRPS had been dropped.

■ *Individual lots have been granted as native titles along the roads, while their wider claims were denied / Marcus Colchester*



This was the very same year that Hap Seng Sdn Bhd applied for a 20,000 acre lease for oil palm development in the area.

As recalled by interviewees, the communities repeatedly asked for seeds to diversify their crops but no sustained support was given to the communities until in 2009, when the government initiated the Agropolitan scheme upstream of the Hap Seng country lease.⁴⁹ Reflecting on their current situation, community interviewees now think they were tricked and that the government knew it was not going to implement the TRPS but was just holding these lands for the companies.⁵⁰

The companies move in

During group discussions with the affected communities, it was hard to reconstruct the exact history of logging operations in the area. As different interviewees recall, logging really started when the first road was driven through the area in the early 1960s, trees being extracted first to clear the path of the road itself and then gradually extending into the surrounding forests.

The villagers do recall that there were some disputes about the logging when it came into nearby areas and impacted on their farmlands. In one instance, after their complaints were ignored, the communities placed a barricade across the logging road of Kilang Papar Kayu United, and this led to negotiations. The people asked for 50 houses as compensation, the company agreed to provide 20 but in the end only built 10.⁵¹

Logging was the main motor of economic development in Sabah from the 1960s to the 1980s, at which time the emphasis gradually began to shift to palm oil. Since 1999, all companies planning oil palm operations in Sabah are required to carry out an Environmental Impact Assessment (EIA).⁵² This includes the requirement that companies resolve claims of native customary rights to the area. Companies are advised that the:

Status of land may be determined by obtaining the cadastral map for the relevant area. If the land is not yet alienated, ground truthing should be carried out to verify whether there are any claimants. Any land under dispute or claims by the locals should be clearly demarcated until decisions are made as to whether it will be acquired or excluded. Under Section 16 of the Land Ordinance, the procedure to follow is as follows: 'Native customary rights established under section 15 shall be dealt with either by money compensation or by a grant of the land to the claimant and in the latter case a title shall be issued under Part IV'⁵³..... When the native rights had been established, recognizing those rights is the main measure to mitigate potential social impacts relating to land ownership issues.⁵⁴

Following the approach pioneered by Sarawak, the government advises companies that find their lands overlap areas of native customary rights, to offer the communities joint ventures:

Recognition of rights may be further enhanced through formation of a joint-venture between the Project Proponent and interested landowners to develop their lands in tandem with the plantation development. This approach will reduce potential conflicts due to land matters and helps to provide an additional source of income for the affected people that may be translated into improved standard and quality of living. Formation of joint-ventures between the smallholders and Project Proponent may be implemented by:

- Identifying the plantation area that comprises native land. The areas shall be properly surveyed and marked on the ground. The acreage shall then be determined and the coverage incorporated into the overall plantation plan;
- Exclusion of native land area from Land Title. Based on the information from above, the Project Proponent may now appeal to the Land and Survey Department for exclusion of such areas from the Land Title and thus will effect some reduction in payable premiums as well as other payments related to the holding the land. On the landowners' side, this information will ascertain their land area that will be included in the joint-venture;
- Development arrangements. Prior to execution of the joint-venture, the following aspects shall be



clarified between the Project Proponent and the smallholders: distribution of development costs, distribution of profits and possible employment of the smallholders to work at the plantation.⁵⁵

According to the information available, the plantation company Hap Seng Sdn Bhd first applied for a country lease over the disputed area in 1997. It then began to develop the land, as described below. The country lease and associated development was then bought by Asia Development Bhd as a property of its wholly owned subsidiary Tanjung Bahagia Sdn Bhd, which it had acquired in 1980. This deal was effective from 2002. Asia Development Bhd was later renamed Genting Plantations, which thus retains overall responsibility for the 8,830 ha plantation area as of 2002.⁵⁶

Genting Plantations is a majority owned subsidiary of one of Malaysia's largest conglomerates, Genting Bhd, which is managed as the Genting Group and which now has a global reach. The company chairman, billionaire Tan Sri Lim Kok Thay, is according to Bloomberg Billionaires Index, Malaysia's third richest man.⁵⁷ The Genting Group includes casinos, hotel resorts, property development, electrical power generation, oil and gas development,

■ *'First they take the logs then they take our land' / Marcus Colchester*

biotechnology ventures, pulp and paper schemes, and oil palm plantations in its very wide portfolio. The company is a client of RSPO executive board member HSBC.

The Genting Group holds a 54.6% holding in Genting Plantations which profiles itself as Malaysia's fourth largest palm oil company⁵⁸ and which holds some 166,000 ha of land.⁵⁹ According to Genting Plantations report to the RSPO in 2012, it currently has 96,000 ha of oil palm plantings in its 37 palm oil plantations in various parts of Indonesia and Malaysia and also owns six mills producing 276,000 tonnes of Crude Palm Oil in 2011.⁶⁰ The company advertises itself as one of Malaysia's fastest growing plantation companies with a market capitalisation in 2012 of US\$2.3 billion.

According to its website:

Genting Plantations continues to inculcate and strengthen "green practices" and best operating standards across its plantation and oil mill activities to promote the growth and use of sustainable palm oil. Its Malaysian estates

have either received Code of Good Agricultural Practice certification from the Malaysian Palm Oil Board or are in the process of gaining certification. Genting Plantations has supported the Roundtable on Sustainable Palm Oil since its establishment in 2004 to promote the growth and use of sustainable palm oil (www.gentingplantations.com 2011 Annual Report).

Impacts

A detailed village census, recently conducted by the village committees with the help of the PACOS Trust, establishes that there are some 2,660 families in the seven villages still claiming Native Customary Rights in the 8,830 ha concession. That is about 13,000 people.⁶¹ These are listed as:

	Village name	Number of families
1	Minusoh	441
2	Liu Pampang	273
3	Namukon	399
4	Mananam	200
5	Napagang	386
6	Lanung	451
7	Maliau	510
Total	7 villages	2,660

Among the many impacts that the communities list as a result of the takeover of their lands are: loss of access to old growth forests used for hunting, fishing, and for collecting forest products such as rattan and dammar.⁶² Community members also allege that the company has even cleared areas planted with durian trees outside their leased area and they complain that ‘they have also cleared the catchment area of the people’s main source of drinking water’. Kampung Tekulong, which features on a map of the British period, has also been cleared and planted with company palm trees.⁶³

All this has had a significant impact on the peoples’ livelihoods as their lands and forests are the source of their daily needs. It means that they have lost house building timbers and wild vegetables. Others complain that the water is now dirty and polluted when

it used to be clean. ‘The wild game has now almost all gone and the fish have been depleted, there are few birds left, and there is no honey anymore, which usually had their hives in the tall *menggaris* trees’.⁶⁴

As Martin Ambisit recalls:

Of course the impact of the company has been serious. They destroyed a lot of things in the process of establishing their plantation. They even destroyed the burial sites of our loved ones without any sign of respect – and our crops and our gardens. We have been trying to tell them to stop, that we wanted our land protected but until now there has been no positive response from the authorities. They have made no payment for the damage and destruction done to the land or the burial sites of my relatives. The bulldozers just came in and when I went to look, it was all destroyed.⁶⁵

Montamin also noted that:

Our house in *kampung* Mananam was simply bulldozed by the company. It is true that the house was empty at the time but we used it seasonally when we went to harvest our fruits – we had durian, rambutan, *langsar*, *terap*, *campadak* (jackfruit), *belimbing* (starfruit), *mata kucing* and *pau*. We reported it to the police. Yes, there is a police report about it... but no action was taken.⁶⁶

The main period of clearance was between 2002 and 2008. The consensus is that the last year Genting did any clearing was either 2008 or 2009. The last remaining area is a riparian strip and it seems that the company has decided not to clear it. It too is community land.⁶⁷

Interviewees also complain that the waters downriver of the mill are now too polluted for drinking and even bathing. The company does have an impoundment to treat waste water from the mill, but, villagers note:

Sometimes during heavy rains, the waste pond overflows into the river and then we have had cases of lots and lots of fish dying along the river downstream.



In such cases community members have lodged complaints with the government department dealing with the environment.

Normally they would say they have made an inspection or have taken the issue up with the company, but later on it turns out they actually stayed overnight with the company, so we are not sure how effective they were as our problem has not stopped. We still have the same problem.⁶⁸

The same interviewees claim that that company never shared its environmental impact assessment report with them and if there was a High Conservation Values Assessment (HCVA) they have no knowledge of it: 'they never disclosed any information with us'.

The Sungai peoples have been especially badly affected by the water pollution. Some of them have even had assistance from government to set up Small and Medium-sized Enterprises (SMEs) to catch and market the fish, but according to the interviewees 'these are now useless because there are no longer enough fish resources left.'⁶⁹

Because of our dispossession of our customary lands which have been taken over by the company

■ *This house has been abandoned now that it is wholly surrounded by oil palms / Marcus Colchester*

for its oil palm plantation, we now have no choice and have to use the gazetted protected forests to carry out our farming activities and this has brought us into conflict with the government. We have to use these forests now for farming, hunting and collection of forest products, like for example we get timber from the Forest Reserves for coffins... Some are even using the Forest Reserves for burial grounds as our original burial areas have been taken over by the company. (Pius)

Other problems have come with the influx of migrant workers who work for the company, most of whom are from Indonesia. The villagers report that there have been thefts from their houses, pilfering of crops from people's gardens, fistfights and commotions when they have attended village festivals and got drunk. Drugs have become more prevalent in the area and there have been also incidences where the estate workers have got involved with local women, who have then been left when the workers moved on.⁷⁰ In one case, a Bugis estate worker allegedly involved in dealing



■ *Putani bin Salag is the penghulu for the Dusun peoples of Tongod / Marcus Colchester*

drugs, cut his wife's throat and he is now serving a jail sentence.⁷¹

Demands and protests

As soon as community members learned that the area where they had for many years been asking for recognition of their native customary rights had been handed over as a Country Lease to Hap Seng, they contested the takeover of their lands, by appealing to the local government.

Some of the interviewees were despondent about the effects of their appeals:

It seems that the Department of Lands and Surveys is collaborating with the company to give all our land away to the company. They are not doing anything to help us but only take the side of the company. There are many levels of government, but personally, I feel Lands and Surveys are responsible for our problem. They have given our lands away. Looked at from the point of view of our customary law, they are in violation of our custom.... we have appealed (to them) for this area for many years, and we are still trying, yet when the company asks for a huge area, affecting so many people, they get it all within two years.⁷²

Community members also appealed to State Assemblymen but no action was taken:

Of course, we feel very disappointed by the way we have been treated by those in power and our government. We brought this (problem) to their attention but they have not solved it. But the problem continues. They have still not given us title to protect our lands.⁷³

Community leaders note:

Our main demand is that the government should take measures to make sure that the land that was taken can be returned to the communities for their farming and other livelihood activities. This would also help ensure that we do not encroach on the Forest Reserve. Our second demand is that the company and government should protect the remaining forests in the country lease, to make sure it is preserved for the needs of the villagers. They must return our NCR lands even if they have been planted with oil palm, because they have planted their oil palm on lands that were already of value to the people or even had crops on them, so it is only fair.⁷⁴

As noted below, after the failure of their efforts to get redress through appeals to the company and the government, the communities took their case to court in 2002. There have been long delays and, frustrated by the lack of progress, at one point community members burned down the company's camp. While the police made some arrests following this incident no one was charged.⁷⁵

The communities have long considered what they should do if they did get their lands legally restored to them but now planted with oil palm. They recognise that they would probably have to form some kind of a cooperative through which to manage the area and market the fruits. If good relations can be restored they could even sell these fruits to Genting's mill.

The fundamental thing is that the rights to the land should be with the people and the company would then become an entity to make sure the palm oil is managed smoothly.

The Tongod case goes to court

In 1999, communities in the Tongod area, with the help of the Kadazan-Dusun NGO, Partners in Community Service (PACOS), sought legal support to contest the takeover of their lands by Hap Seng. The case was then very carefully prepared. PACOS worked closely with the local people to map customary lands. This included both 3-D modelling of land use and occupation and then the survey and mapping of the extent of the NCR claims using GPS and GIS technologies. With the help of the lawyers, sustained efforts were undertaken to ensure that the communities were aware of their rights under the Constitution and the law. The risks and possibilities of securing a favourable judgment in the courts were also carefully explained, as were the possibilities of provoking an adverse reaction by the government. A series of lengthy community discussions followed as the communities debated their options. Seven communities decided to file claims for their lands, while others decided to accept the compensation monies on offer from the company.

The claim was thus submitted to the courts in 2002 in the name of five community leaders as representatives of the seven communities of Kampung Maliau, Kampung Minusoh, Kampung Liupampang, Kampung Namukon, Kampung Mananam, Kampung Napagang and Kampung Lanung. The defendants were named as the three companies - Hap Seng, Asiatic Development and Tanjung Bahagia – as well as the Department of Lands and Surveys and the government of the State of Sabah.

The communities contend that the area of the Country Lease overlaps their Native Customary Rights, which have never been extinguished by any act of the State. The government has therefore acted unlawfully by alienating their lands and awarding them to the companies in the form of a Country Lease. The Country Lease is therefore null and void having been issued in contravention of Articles 8 and 13 of the Federal Constitution which guarantee equality

before the law and the right to property, which the State has a fiduciary obligation to protect. The Country Lease has also been issued contrary to the provisions of the Land Ordinance which protect native rights. The companies are therefore trespassing on NCR land. Accordingly the lease should be cancelled and vacant possession given to the customary owners or the areas of NCR should be excised from the lease.

The communities also demanded a prohibitory injunction to halt the companies trespassing, clearing, using and occupying the land and to get the company to cease all operations and remove all structures and machinery. They also demand damages, aggravated damages, interest and costs, and such ‘other relief as the Honourable Court finds fit and just’.⁷⁶

Both the companies and government defendants have disputed the communities’ case. The lawyers acting for the defence have argued that the case was not ‘admissible’ in the courts as the communities had not sought to have their NCR claims verified by the Assistant Collector of Land Revenue nor had their claim been considered by the Director of Lands and Surveys. The case thus had to be heard at a ‘preliminary interlocutory court’ just to make a judgment on whether or not the case could be heard.

The lawyers acting for the communities, for their part have argued that the case is admissible as the responsibility of Lands and Surveys was over State land, whereas the land in dispute was alienated land. Moreover, the case is not just about whether or not Lands and Surveys should recognise rights based on the Land Ordinance. On the contrary, the claim being made by the communities was that their Native Customary Rights to land were also based on the Common Law and on the protective provisions of the Constitution, matters which the Assistant Collector of Land Revenues (ACLR) and the Director for Lands and Surveys are not competent to examine. The case, the lawyers argued, thus has to be heard in Court as it raises issues that only the courts are competent to give judgment on.

Before we were happy living here on our land but now we face difficulties because so much of our land has been taken over by the company for the oil palm plantation. Before there was rattan and other forest resources but now these are very hard to obtain. Now I am very worried, yes, very concerned as it will definitely affect our future. There is no rattan for our handicrafts, and the baskets we use for our farming activities.⁷⁹

She has a good knowledge of medicinal plans. She used to get them from the forests but now there are no more.

Now to get medicines I have to go all the way to Telupid to the clinic.

The community is also expanding rapidly in numbers and there are concerns that there is not enough land for the next generations. She has more than 20 grandchildren and three great grandchildren but now she has only 2.09 acres of land to hand on to so many people.

I don't feel happy about that, it is not enough. My main concern is to get the land back. The land means so much to us: its value cannot be described.

My hope is that when we get through this case and win it, and get our lands back, then our lands will be reinstated. Our people have tried our best to appeal to the Government about what we are facing with regard to our land. It should be given back to us. But, so far, our appeals have not been given due consideration. They just make us promises but until now nothing has been done about. They make promises but their promises are empty.⁸⁰

The way things are going on, I am very uncertain and worried about our future. While maybe at present we have enough to sustain us, for our children and their children we have nothing to pass on to them. And with the population increasing there will not be enough for them. If this is not addressed now, with our land given to the companies this may lead to serious conflicts between our people and other parties. The way things are going on, it seems that the government is more interested in the companies than in our rights and our future generations. Even now, the

way some people have been resettled without sufficient lands for their farming or to supplement their needs from the surrounding forests, there are already serious problems.⁸¹

A lot of our people are very concerned because what we have is so much less than what we used to have – right now people feel pressured and feel something must be done... We hope you can help our people to bring this information about our problems to the attention of other people, so they can support our cause. Maybe more people can make a noise about our situation, so we don't feel we are alone. We now hope that if many people support us it may create a solution. Otherwise it will drag on and things will get worse and make many problems for our children and grandchildren and the next generations.... You have made a great effort to be here and we are very grateful for that, it shows you people are concerned.⁸²

Conclusions

It is clear from the judgments of the courts that under the laws of Malaysia, and of Sabah in particular, native communities can continue to assert rights in land and that custom is the source of such rights. This continues to be the case even though successive governments both under the British and since independence have sought to limit and hedge in these rights through legal impositions. Arguably, as a result of over a century of pressure from government, communities have begun to consider their lands more as individual holdings than as heritable family usufructs within communal tenures.

The government however continues to contest customary claims and even rejects the judgments of the courts, preferring instead to free up lands for commercial development by private companies. Genting, having taken over the Country Lease of Hap Seng, is a beneficiary of this contempt of the communities' rights. The courts have yet to determine whether or not in this case the Lease they have acquired is valid and whether or not the lands legitimately belong to the communities or the company.

The current intransigence of the government, in refusing to honour the decisions of the courts and respect customary rights, makes for both a problematic investment climate and provides a very difficult basis for community development. Faced with this refusal of the administration to recognise or process their claims, communities are instead obliged to fight every single case through the courts. Even though the time these cases are taking has now begun to lessen from over a decade to more like two or three years, this is still a formidable and unjust burden to place on the communities. A more reasonable approach would be for the State Assembly to amend or repeal the laws in a way that could facilitate the determination of rights and titling of lands. This might be done by a Tribunal which could process claims and instruct the Department of Lands and Surveys to issue titles.

Unfortunately, Genting Plantations Sdn Bhd has declined to be interviewed for this case study⁸³ and has also refused to supply copies of its social and environmental impact assessments and its High Conservation Value assessment.⁸⁴ It has done so on the grounds that the disclosure of these documents may adversely affect the court case.⁸⁵ Unavoidably we are therefore obliged to draw conclusions about the Tongod operation without being able to set out the company's own point of view. This is regrettable.

Genting Plantations is an ordinary member of the RSPO and has been prominent in participating in the RSPO's standard setting committees, and on occasions has represented the Malaysian Palm Oil Association in these discussions. The Tongod investment does not sit well alongside this public positioning.

It seems clear from the findings from the field and the testimony of all those who agreed to be interviewed that Genting Plantations is in violation of some key principles of the RSPO. Neither it nor its subsidiary Genting Tanjung Bahagia

Sdn Bhd has shared basic documents about its operations, management, impact assessments, and operational procedures with the affected communities (Criteria 1.1 and 1.2). Its right to use the land for its operations is being legitimately contested by local communities (Criterion 2.2). Its use of the land is diminishing the communities customary rights to their lands (Criterion 2.3) and the company is operating contrary to the free, prior and informed consent of the peoples concerned (Criteria 2.3, 6.4 & 7.5). No effort has been made to carry out participatory mapping of the areas claimed by the communities (Indicator for 2.3). There is no mutually agreed system in place for the resolution of disputes (6.3). The company has continued to clear land and expand its plantings without the communities' consent (6.4), without a participatory HCV assessment, and, so far as we can ascertain, without setting aside lands for HCV 1, 2, 3, 5 and 6 (5.2, 7.3).⁸⁶ There are allegations that waste waters from the mill are polluting downstream waters (5.3). These are serious violations and constitute reasons for suspending the certification of all Genting Plantations' operations.⁸⁷

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 80. Nanak Binti Andani, interviewed in Napagang, 25th September 2012.
 81. Martin Ambisit, interviewed in Sanam, 24th September 2012.
 82. Martin Ambisit, interviewed in Sanam, 24th September 2012.

83. Email from Chew Jit Seng to Marcus Colchester, 3rd October 2012.
84. Email from Chew Jit Seng to Marcus Colchester, 2nd October 2012.
85. Email from Chew Jit Seng to Marcus Colchester, 2nd October 2012: in the email GENP states:
'In view of the status of the case being still ongoing and pending hearing by the High Court, it is therefore not appropriate for us to disclose at this time, any information or documents pertaining to the above Tongod land as these may be deemed sensitive and may influence the proceedings and/or the outcome thereof.'
86. During our field visit, we did note evidence that at least one area of forest has been set aside as a riparian strip in conformity with Sabah environmental laws and this may also be considered an HCV4 Management Area.
87. RSPO Certification Systems 4.2.4, as revised March 2011.

11 The Mani people of Thailand on the agricultural frontier

Kittisak Rattanakrajangsri, Thapat Maneerat and Marcus Colchester



■ *Mani of Klong Tong in Palian District / Marcus Colchester*

The Mani do not have any rights, they live in the forest. (Thai settler woman¹)

Introduction

The problematic situation of the indigenous peoples, so-called ‘hill tribes’, of northern and western Thailand is well known.² For most of the second half of the 20th century, government policies deprived them of land rights and citizenship and sought to resettle them in the lowlands, as the Government

viewed them as forest-destroyers,³ potential allies of communist insurgents⁴ and narco-traffickers.⁵ That situation is beginning to change, in part due to more enlightened views being adopted by Government officials,⁶ in part because the cultural diversity of the ‘hill tribes’ has become a magnet for eco-tourism⁷ but, mainly perhaps, because of sustained advocacy by the peoples themselves, and their NGO supporters, who have developed strong social movements and alliances with the poor to press for their rights.⁸

By comparison, the even more precarious situation of the remnant indigenous peoples of eastern and southern Thailand is almost unknown. One such group is the Mani,

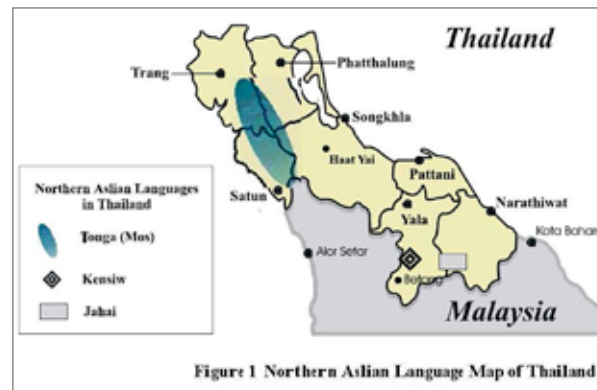
‘Negrito’ hunter-gatherers who live in the forested Banthad Mountains along the watershed between Satun, Patthalung and Trang Provinces in southern Thailand. Since the 1960s this area has experienced a dramatic expansion of tree crops, mainly rubber and more recently oil palm that has led to rapid forest clearance, road-building and forest colonisation.

The oil palm sector in Thailand is unusual in that about 70% of the planted area has been established as small-holdings.⁹ Most of this expansion has occurred in the central and southern parts of the country with a vigorous focus around Krabi and now extends southwards down the Peninsula. Until now, industry interests and academic analysts have suggested that oil palm expansion in Thailand is not affecting indigenous peoples. But the question is: have those who make such assertions looked in the right places?

This paper results from a short diagnostic survey, undertaken jointly by the Indigenous Peoples Foundation of Thailand and the Forest Peoples Programme in January 2013.¹⁰ The study aimed to ascertain the situation of the Mani people in relation to agricultural expansion, draw attention to their plight and consolidate links between them and the indigenous peoples of the north.

Languages and origins

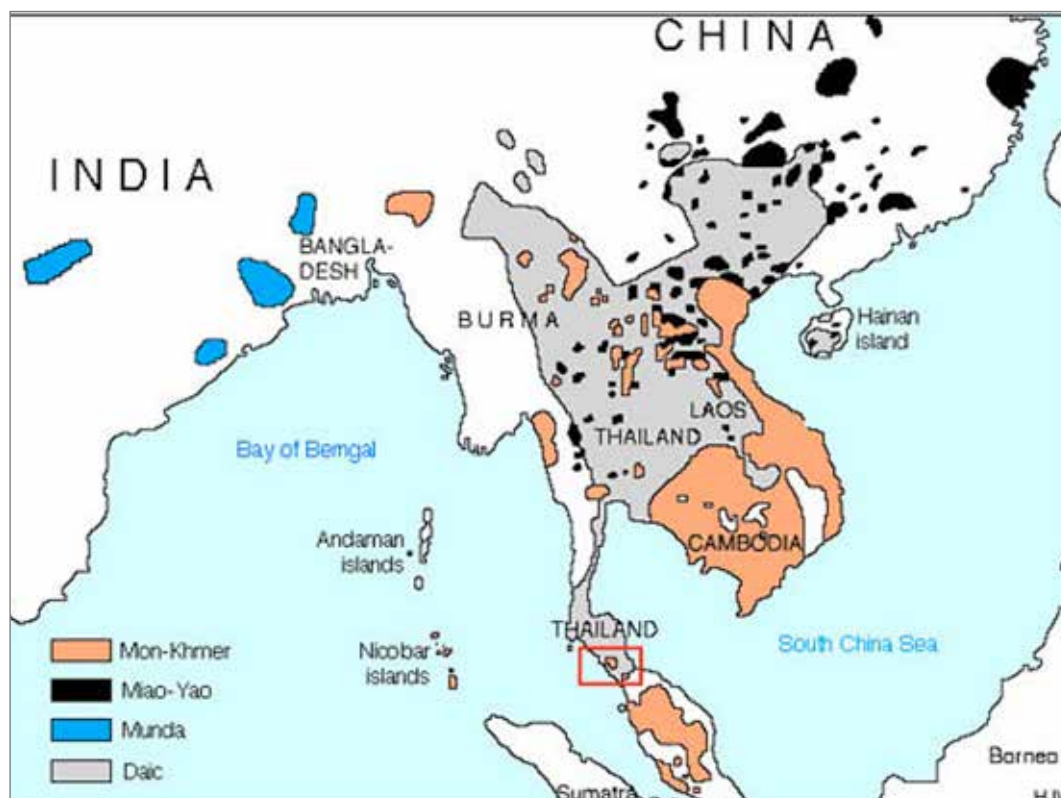
According to linguists, the Mani people speak one of the several Aslian languages, which are spoken by the numerous forager groups who inhabit Peninsular Thailand and Malaysia,¹¹ where they are known collectively by the Malaysian Government as Orang Asli (Aboriginal Peoples).¹² In



■ *The Mani (shown as Tonga (Mos)) live in the forests bordering three provinces, Trang, Satun and Patthalung. Semang (Kensiw) and Jahai foragers live further south in Yala and Narathiwat. (Source: Bishop & Peterson 1999)*

■ *Mani forest camp near Wong Sai Tam in Satun Province / Marcus Colchester*





■ Regional map showing approximate location of Mani (red box), part of the Austroasiatic (Mon-Khmer) language group.

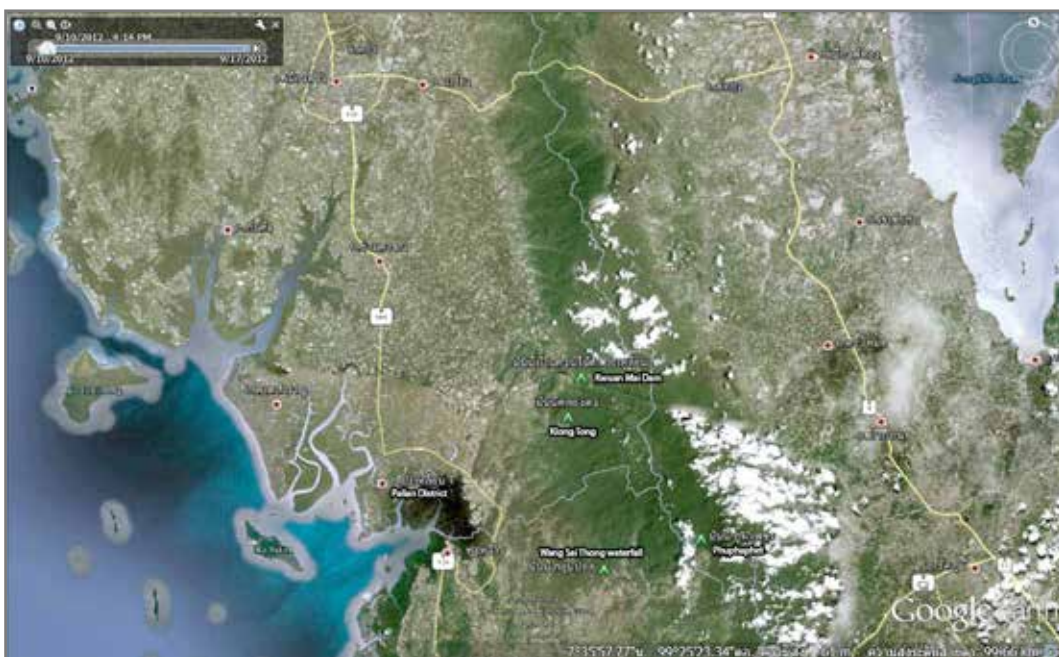
many ways, the Mani closely resemble the Semang peoples to the south, which include a small group in Yala Province and those just across the border in Malaysia.¹³

The Aslian languages are in turn considered to be part of the Austroasiatic family of languages which includes the better known Mon-Khmer language group, Vietnamese and the languages of other indigenous peoples of north-east Thailand, such as the Mrabri, and the various Khmuic groups of the Annamite Mountain chain between Vietnam, Cambodia, Laos and south-west China.¹⁴ It is presumed that the Austroasiatic language family stems from the south-east Asian mainland and these languages today represent the modern descendants of a linguistic substratum that has been overlaid by the Austronesian, Tai-Kadai (Daic), Tibeto-Burman and Miao-Yao language groups that came later.¹⁵

Physically, the Mani resemble the other so-called 'Negrito' peoples found in the

Andaman Islands, Peninsula Malaysia and the Philippines: they have dark skin, broad noses and curly hair. Physical anthropologists have long suggested that such peoples are descendants of one of the early waves of human migration out of Africa and genetic studies seem to confirm this.¹⁶ An archaeological survey of one of the cave-like cliff shelters still inhabited by Mani today suggests almost continuous occupation for 10,000 years.¹⁷

Whatever the truth of these conjectures, what is clear is that the Mani people both look very different to, and speak a language highly distinct from, the majority of the southern Thai. They thus hold themselves to be quite separate from the Thai and are so perceived by the Thai themselves. They refer to themselves as 'Mani', which means 'people' or 'human beings', and they refer to all outsiders as *hami*, including Europeans (*hami kalang*). Locally, the Thai refer to the Mani as 'Sakai', a Malay term with the connotation of 'slave' that is widely used in Malaya, eastern Sumatra, and the Riau and Natuna archipelagos, to refer to sub-dominant forest peoples. More colloquially, in the Southern Thai language the Mani



are also referred to as *caw paa*, meaning ‘savage’ or *chao ngawh* meaning ‘rambutan people’, because their curly hair is thought to resemble rambutan fruits. All such terms are pejorative and the latter two terms are strongly resented by the Mani.¹⁸

Geography and vegetation

Trang and Satun constitute the southernmost provinces on Thailand’s Andaman sea coast. The average rainfall is around 2,008–2,700

■ Location of the forest camps (green triangles) visited in the field survey

millimetres annually.¹⁹ Although the area experiences a strong seasonality related to the monsoon in the Indian ocean, with a dry season from January to May and a wet season for the rest of the year, the overall high rainfall has allowed the area to develop an almost continuous, mainly evergreen, forest cover. Until the spread of farming this forest only gave way to swamp forests, mangroves

and areas of sea-grass along the shoreline and to seasonal montane forests in the interior uplands.

In Trang, the forest cover has been decreasing. In 1985, the forest cover was 20.8% (639,375 rai), but by 1997 the total forest cover in the province was already down to 18.86% (579,719 rai). The main causes of this loss are illegal logging, development of infrastructure, drought and wild fires, expansion of agricultural areas and expansion of shrimp farms. As noted below, this process of deforestation has since accelerated alarmingly.

In southern Trang and northern Satun, where the study was focused, the gently undulating coastal plain gives way abruptly to sandstone and limestone massifs which rise on sheer cliffs above their surroundings. In places the vigorous rivers, bursting over the edges of these cliffs in the form of spectacular waterfalls and then wriggling their way down narrow valleys to the sea, provide a popular draw for the more adventurous kind of tourist.

History

The forest peoples of the Thai-Malay Peninsula played a central role in the area's history. From at least two thousand years ago, trading links developed through Southeast Asia to connect the rising powers of China and India. The trade route between West and East in turn promoted the development of coastal principalities in Southeast Asia that offered secure ports at which exchanges could be made. Also traded was the produce of the region itself, in particular the precious resins, dyes, woods, rattans, medicines and animal products, that came from the forest peoples and which were traded far to both East and West. The coastal trade entrepôts thus relied on the vigour of the forest peoples to whom the traders related in ambivalent ways, on the one hand, valuing them as vital trade partners while, on the other hand, seeing them as backward, 'slave' peoples subservient to their coastal rulers.²⁰

Politically, on a regional scale, control of the area and the extraction of tribute from the local rulers of these trade-based principalities was contested between the Mon kingdoms of Dvaravati in what is today's Thailand, the early Malay Empire of Srivijaya based on the east coast of Sumatra, the Champa of south Cambodia and Vietnam, the Khmer empires of Angkor Wat, the later Malay sultanates and the Thai principalities that became Siam, as well as China itself. Although much of this trade was connected by sea through the Malacca Straits, there was also a vigorous land route across the Peninsula, which had a western end at Trang from at least the 3rd century AD.²¹ Evidence of this close relationship between the Mani and the trading kingdoms comes also from their language, which includes both Khmer and Malay borrowings, as well as more recent Thai elements.²²

Although Siam became the dominant power in the region from the 15th century onwards, with the decline of the Khmer Empire based around Angkor Wat, it did not directly control the Mon principalities and later Muslim-Malay sultanates that developed on the Peninsula, instead being content to force them to accept Thai suzerainty and exact tribute. It was only with the intrusion of European colonial powers that the Thai Kingdom of Siam felt obliged to consolidate its power and assert direct control over the region.²³ In 1909, a boundary was agreed between the British-protected Malay States and Siam and this remains the border between Thailand and Malaysia to this day. Copying the example of the colonial powers, the Thai State then formalised law and administration in this newly annexed southern part of its domain and subjugated customary laws to the laws of the modernised Thai State.²⁴ It was from this time that a conscious policy to develop agriculture in the region began to receive State support, including the promotion of lowland rice and rubber.

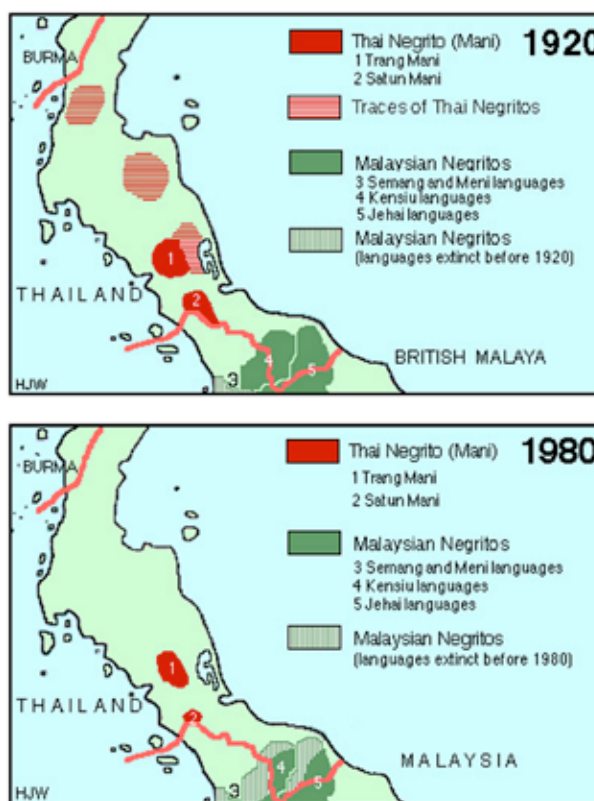
It was in 1905 that the Mani first came to the attention of the Thai King (Rama V). The King is said to have adopted one

Mani boy named ‘Kanang’, who died in the royal palace when he was around 20 years old during the reign of Rama VI.²⁵ A local legend has it that Thai courtiers tried to persuade the Mani to visit the King in Bangkok but the Mani were very mistrustful and so it was only while they slept that the courtiers were able to take away the sleeping Mani child. The child was sent to Bangkok and was adopted by the King. The child however would not stop crying and only desisted when given some red clothes to wear, from which time the Mani are believed to like red clothing, although in fact, as the authors were told by the Mani, they don’t!

Corresponding to the gradual expansion of the Thai State and commercial farming, the forested areas of the Negrito peoples of the Peninsula became diminished. Successive field studies by anthropologists⁶ show the gradual contraction of the extent of the Mani and neighbouring Aslian groups (see maps on right).

The institution of slavery has been an intrinsic part of Southeast Asian society for thousands of years and rulers had always sort to expand their cities by capturing slaves from highland groups and from other areas and bringing these people to work in the lowlands.²⁷ However, as part of its programme of modernisation, from 1874 the Kingdom of Siam progressively restricted and then prohibited slavery and these laws were later applied in southern Thailand, following its formal annexation in 1909. How long before these laws came into effect in Trang remains unclear: the enslaving of Aslian groups in Malaysia was recorded as late as the 1930s.²⁸

During the 1960s and 1970s the forested areas of southern Thailand and Peninsular Malaysia became refuges for communist insurgents.²⁹ The insurgents relied on shifting cultivators and forest peoples for supplies and to act as their guides. The army would also press the locals to provide support. Caught between these two forces, most chose to avoid involvement.



■ Maps showing gradual extinction of Mani as farming expands

Interviewees recall one occasion in Kwan Mae Dam when a fire-fight broke out between the army and insurgents and all the villagers fled far away for nearly two months to wait for things to calm down. Not surprisingly, people were somewhat reluctant to provide us details of their roles in these situations.³⁰

The more recent Muslim extremism which has begun to affect southern Thailand is largely limited to the Provinces of Yala, Pattani and Narathiwat but the Mani say it has discouraged them from making contact with other Sakai groups said to live in those regions.

Making a living

In common with most of the other Aslian peoples of the Peninsula, the Mani way of life is profoundly shaped by their foraging mode of living, which includes hunting, fishing, gathering and the use of a very

wide range of forest products for their own welfare, for subsistence and also for trade.³¹ As noted, the Mani have been deeply involved in the regional trade in forest products for millennia, they continued into the 1950s to supply the local markets with forest products such as rattan which they would exchange for shop-bought goods, tobacco and rice. Even today, Mani bring herbs, medicines and aphrodisiacs from the forests to trade with villagers and tourists.

‘Since they must carry themselves all the comforts that they possess’ the anthropologist Marshall Sahlins famously remarked of mobile foraging peoples, ‘they only possess that which they can comfortably carry themselves.’³² Accordingly, Mani material culture is quite simple. Apart from clothing and traded metal implements – digging tools, axes, knives and cooking pots – most of the rest of their needs are made from immediately available forest products. Their single roofed huts, most of which don’t have walls, are only large enough to cover their sleeping platforms which they construct in a low-V shape, so they sleep with their feet and heads up. These shelters can be constructed in a matter of minutes from local vegetation.

The origins of the Sakai : a local Thai legend

In the old days, during the time when all the animals were created, there was a chief of a small kingdom where there were some Sakai. The chief felt sorry for them as they seemed so poor. So he gave them some goats and some sheep and hoped they would prosper. Later when he came back to them to see how they were faring, they offered him a very poor meal. The king was disappointed and offended, and he cursed them. Later a crow flew over with fire in its beak. The crow threw the fire down on the Sakai. The whole area caught fire and the Sakai were badly burned. That is why the Sakai are black, have frizzy hair and wear no clothes.³³

More sophisticated are their baskets made from vines and palm leaves, which are made in a variety of forms, and their blowpipes (*balaw*) made from canes. Every hunter also equips himself with an internally chambered quiver for safely holding poisoned palm wood darts, the points of which are weakened so they break off in their prey, should the animal attempt to pull the dart out.

■ *Typical hut for a single family in a forest camp /
Marcus Colchester*



While monkeys and apes provide the main game animals hunted with blowpipes, a number of ground dwelling species are also hunted by being dug from their burrows, including forest rats, bamboo rats (*Rhizomys spp*) and a species known locally in Southern Thai as *mudin* ('soil pig'), which is probably a variety of ferret-badger (*Melochale spp*) and, the authors were told, a particular favourite.³⁴ Rivers and streams also provide many sources of protein such as freshwater shrimps, frogs, snails and small species of fish.³⁵

The majority of the carbohydrates in the traditional Mani diet come from a variety of species of wild yams (*Dioscorea spp*),³⁶ which grow widely dispersed through the forest. It is the availability of these yams which above all dictates the movement of people. As people explained to us, when the yams in one area get used up, they move to another area where yams had been reported by other hunters. The decision to move is made by the headman having checked the suggestions of the hunters and canvassed the community.

Camp sites are carefully selected for a variety of factors including available water, building materials, security from falling trees as well as the fruiting cycles of various favoured species. According to interviewees, the tendency is for the Mani to move camp five to six times each year, taking account of the seasons and the flux in the size of their groups, which split up and rejoin frequently.

The authors' interviews suggest that the Mani are also highly mistrustful of outsiders, which may be a legacy from the era of slavery, still dimly remembered by those the authors interviewed as something they heard about 'from before our time' of which they said 'but we are still afraid of that'. This caution also reflects the persistent discrimination they face from lowland Thai, who will scornfully refer to them as 'savages' even within their hearing. In Kwan Mae Dam, the Mani told us they were reluctant to settle down as they feared



■ *Blowpipes and quivers against the wall of a rock shelter camp / Marcus Colchester*

■ *Yams are dug up using a metal-ended digging stick / Marcus Colchester*



being captured and cut up and their internal organs traded.³⁷

As noted below, the forests that the Mani depend on are now being rapidly cleared by lowland Thai farmers. At the same time the value of their traditional forest products in the local and regional trade has also markedly declined. Many groups have been displaced from their favoured foraging areas by these encroachments. The Mani have thus adopted a variety of other survival strategies to cope with these changes. A small minority have begun to farm crops such as bananas and sweet potatoes. In at least two villages, Kwan Mae Dam and Klong Tong, Mani have also established their own small rubber gardens.



■ *Mani blowpipe darts in their quivers, showing the chambered holders / Marcus Colchester*

Klong Tong is an interesting case. In this settlement, the Mani have settled permanently, they have accepted identity cards and in the last five years have built permanent dwellings. Three factors seem to have precipitated this change. First, the settlement was established at the initiative of a local Thai farmer who married two Mani girls and now has a large Mani family. Secondly, the headman of the Mani group (who has since died) thought that the Mani needed to have land security and agreed to the idea to plant rubber. Thirdly, the local government and forestry officials agreed to the plan (the whole village is in a forest reserve) and so the officials provided roofing materials and allowed the use of local trees to make planks for housing.³⁸ Although the area is only accessible through a steep portage between the mountains, which has now been opened to motorbike, five or six lowland Thai families have now also settled in the vicinity and opened up extensive rubber gardens.

The other more widely adopted survival strategy is to carry out occasional wage labouring for local farmers. When forests are

depleted or they feel the need for cash, both men and women will labour in the rubber and palm oil estates. A few have also begun working with tourist resorts, where their 'exotic' appearance is an added attraction.

In Kwan Mae Dam, for example, one small Mani group has established a camp on the edge of the forest at the end of a tourist elephant trail. The tourists mount the elephant, are led through the rubber gardens and then the forest and are brought into the camp where they are able to see Mani going about their daily lives. The Mani then demonstrate their skills with blowpipe and digging stick and allow themselves to be photographed. In exchange they get modest cash payments with which they are able to buy food from local stores.³⁹

In Wong Sai Tong, Manang District in Satun Province, the Mani have also developed a relationship with a local tourist operator who set up alongside the river some ten years ago.⁴⁰

Originally, the Mani did not like tourism as they did not trust the tourists, but now, the authors were told, 'we are getting used to it'.⁴¹ 'They like to look at us because we look different and have a different lifestyle. The civilised people come and they look down on us: we don't like that... I don't know why. Maybe they think we are poor and that we don't have anything to eat.'⁴²

We can do any kind of work – we don't demand any pay, we take whatever they will give. We do good to people but sometimes they don't give good in return. Sometimes we will just get a bag of rice instead of fair payment. With those who treat us well, we will work well for them, but with others we will refuse. Sometimes the villagers come and chase us away as they do not want us living near them... We were living in a cave under the cliff by the waterfall, which is now a tourist site and they chased us away. They fired guns to scare us off.⁴³

The authors were informed that in Patthalung the majority of the Mani have now settled and make a living from small rubber gardens and wage labour.

Locations

Given their highly mobile way of life, it proved quite difficult during a short visit to get even an approximate idea of the Mani's whereabouts and numbers. Even in the settlement of Klong Tong which has been a 'permanent' village for 15 years, the authors found that about half the community were away foraging when they visited. Moreover, since all the groups are quite closely related, there appears to be a constant flux of family members changing their residence between one group and another. The table gives some approximations of numbers based on estimates given by various interviewees including Mani, local Thai tourist guides and the local administration. It seems reasonable to suggest that there may be about 250 Mani in the three provinces of Trang, Satun and Patthalung.

According to those Mani whom the authors interviewed in Satun and Trang, their links with their relatives in Patthalung are gradually being lost, as the forest trails linking the areas are lost and much of the intervening area has

Mani groups identified by this study ⁴⁴		
	Name of group or location	Approximate numbers
<i>Trang Province</i>		
1	Khao Wa Sum*	25-30
2	Klong Tong*	40-50
3	Kwan Mae Dam*	8
4	Khao Ting Cave	30-35
<i>Satun Province</i>		
5	Wang Sai Tong	30
6	Wang Sai Tong splinter group*	20
7	Phu Pha Pet*	40-50
<i>Patthalung Province</i>		
8	Pha Bon	20-30
9	Name not recalled	20-30
	Approximate total numbers	230 - 290

been cleared for farming. The Mani also informed us that there are other Mani groups in the forest who are avoiding contact: sometimes they come to the camps but find the people have fled. The authors did not have time to investigate this further.

■ *Tourist poster showing Mani hunters with their blowpipes and wearing red cloth / Marcus Colchester*



Land

In discussions about their lands and forests, the Mani made clear that although they resent the forest clearance they have not taken actions to prevent it. The Mani note that forest loss through logging and now the expansion of rubber, palm oil and tourism is limiting the extent of the forests from which they can make a living.

Yes, the rubber farmers took the land but we don't have a sense of ownership of the forests: we don't say this is mine and this is yours, like they do. As long as there is forest, we can make a living. We don't claim the land and we don't say this is my forest. We just want the forest to be kept, so we can go on living as we do. As for the outsiders' world, no matter how developed and however much money they have, we don't want that. We want the forest to remain so we can go on living here.... No, we don't object [when they take the land], we just keep moving: we don't have the power to stop them. The forest encroachers and illegal loggers can't even be stopped by the forestry officials. So what could we do? They are powerful people and they might even shoot us.⁴⁵

The Mani spokesperson, Poi, who has travelled twice to the Indigenous Peoples' Day events organised by the national

indigenous peoples' organisations, has been exposed to the idea of land rights. But he was sceptical that such an approach had relevance to the Mani. As he explained:

We have not asked for rights to land. We are concerned that if we are given rights to land, then we will be restricted to small areas. So if we claimed land rights we would lose our freedom.⁴⁶

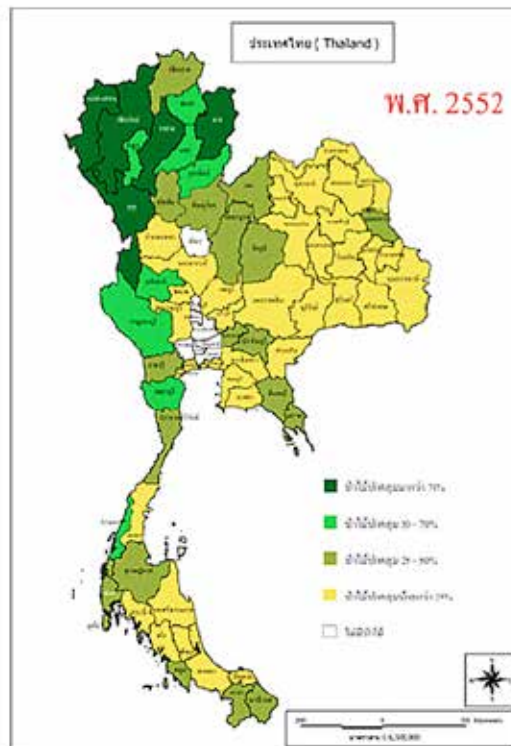
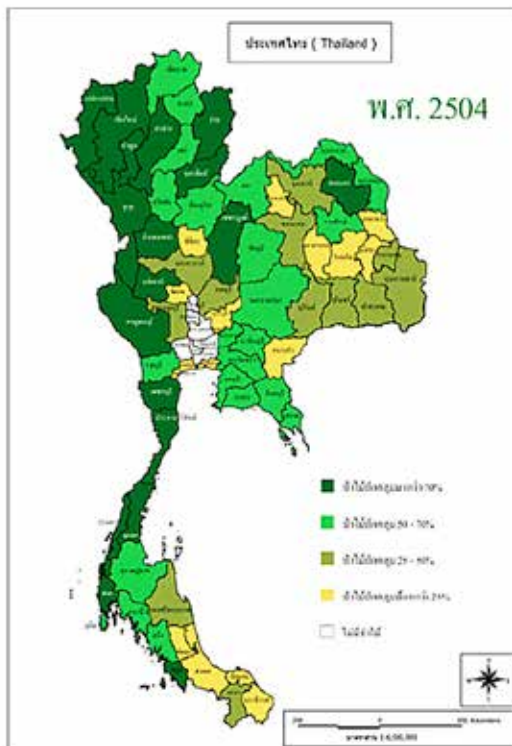
According to local Thai farmers and shop keepers who the authors chatted to in northern Satun and southern Trang, most of the resident Thai farmers and shop keepers have come into the area as pioneers in the past five decades, with the majority arriving within the past 20 years.

Indeed the original settlers in Kwan Mae Dam village in Palian District, the village nearest to the Mani groups that the authors focused on, moved to the village from the Batra valley, about eight kilometres away up in the mountains. In the 1940s the majority of the villagers of this thinly populated district were avoiding the coastal plain as it was both malarial and vulnerable to bandits. Most of them preferred to live from the shifting cultivation of dry rice in the hill forests. In the early 1950s the current village of Kwan Mae Dam was established with an original population at that time of only six families.⁴⁷

■ *Poi, Mani spokesperson from Wang Sai Tong, works in a tourist resort / Marcus Colchester*



The development of the land for rubber began and soon drew further settlers into the region. Rubber is suited to areas where transport is difficult as the cured latex can be stored and taken to market on motorbikes if roads are not available.⁴⁸ Oil palm however is much more demanding of good infrastructure but in the last decade, as prices for Fresh Fruit Bunches (FFB) have risen and since the roads are now well maintained, conversion of forests and old rubber gardens to oil palm has become more common. Prices for FFB peaked at near six baht per kilo in 2011, but locally prices have now declined to 2.4 baht per kilo, making some farmers rueful about their investments, which no longer seem competitive with rubber.⁴⁹



■ Maps comparing forest cover, 1961 on left, 2009 on right. Dark green = > 70%, light green = 50-70%, yellow-green = 25-50%, yellow = < 25 %.⁵⁰

In Palian District, the characteristics of the two crops have also led to different relations between land owners and labourers. In rubber gardens, those who are contracted to harvest and process the latex need to be highly skilled workers and so enter into a long term agreement with the land owner. They get 40% of the sale price while the other 60% is taken by the land owner, a proportion that becomes 50/50 where the terrain and transport make harvest more difficult. Harvesting oil palm however requires brute strength more than skill and so casual labour is used with workers paid as little as one baht per kilo harvested. Workers can expect to earn the minimum wage of Bt 300 per day that way (about US\$10.40 at current exchange rates).

According to the local government, while rubber began to be planted in Palian District in the 1950s, it was only about 10 to 15 years ago that oil palm was introduced, although it had begun to be planted much earlier in Trang and around Krabi further north. Today these two tree crops, rubber and oil palm, have been planted on most of the available lands between the coast and the mountains and indeed the crops lap up like a sea to the very foot of the cliffs of the limestone massifs.

As in many other parts of Thailand this rapid expansion of monocrops has been largely driven by smallholders and local capitalists rather than by large companies.⁵¹ In fact, as interviews showed and the local government confirmed, most settlers have come into the region through family connections from other more densely settled parts of southern Thailand, notably Patthalung. Muslims still make up some 95% of the population although Buddhist Central Thais are also beginning to make a presence.

The authors' field surveys showed that there has also been massive encroachment of forestry reserves and other protected areas by migrant farmers, mostly for rubber but also for oil palm.

As noted above, the loss of forests is a major problem for the Mani. Some lowlanders concur. One of the founding Thai elders in Kwan Mae Dam told us:

The future of the Sakai [Mani] is quite difficult. Forest is getting less and less and there is no

more food in the forest for them. More and more forest is being destroyed both in Patthalung and here in Trang. Almost all the forests have been converted. In 20 years there will be no more forest land. Even now the water is decreasing as a result and I expect it to be much worse in 20 years' time. It may also get worse for us – not just the Sakai – as land is in short supply.⁵²

The Mani headman of Klong Tong, the most settled village the authors visited, also remains sceptical of the value of abandoning their traditional way of life.

If we could choose, we would prefer to live in the forest, there used to be plenty for us there. But now we cannot move and we have to live here permanently.⁵³

In interviews with local government representatives they expressed ambivalent views about the problem of land clearance in forest reserves. On the one hand, they admit, the problem of encroachment is serious but, on the other hand, they also feel such encroachment should be allowed and even encouraged as poor Thai need land. Besides, they noted, even the forestry officials seem to be unable to control encroachment as the population is increasing and is hard to control. Even where Forestry Officers have expelled encroachers, they told us, new settlers have replaced them. Other

villagers informed the authors that forestry officials actually connive in allowing encroachment into the Forest Reserves and have taken bribes to allow the clearance. However, the land department will not issue land titles to encroachers. This problem of encroachment has been severely exacerbated by the fact that the local government has built a large number of roads into the Forest Reserves.

Contradictorily, in Satun Province, the authors were told that Forestry officials have prohibited the Mani from cutting trees to make houses, as they want the Mani to stay as they are and not disturb the forests.⁵⁴ In Trang, the Mani told the authors they were scared of the Forestry Officers as they carry guns. In Satun, the Mani said that the Forestry Officers restrict the Mani from selling forest products and game in the markets.

They should say the same to the settlers. They hunt with modern weapons and then sell the meat: and when they miss the game flees far way.⁵⁵

The local government believes that the Mani need to settle down and adopt cash cropping if they are to find a place in the regional economy. However they also noted that they cannot provide land to the Mani unless they have ID cards which they will only issue once the Mani are settled – a Catch 22 as the only reason they might settle is if they did have secure lands. Pressed on this matter the government also admits that land in the area is already scarce: 'it is true, there is no land for them'.⁵⁶

Actual conflicts between the settlers and the Mani are quite uncommon according to those the authors interviewed. Interviewees recalled only one incident of violence in which a settler shot a Mani who was pilfering bananas from his farm. In line with their survival strategy, the Mani's response to local depletion is simply to move elsewhere. As one Mani noted in Kwan Mae Dam:

We would like to have more forest rather than all this rubber so we could stay further down,

■ *Tau Chai headman of Klong Tong / Marcus Colchester*





where the villagers are now. We need more big trees for our way of living, but, because of the encroachment on land and the rubber trees, we have to move further into the forest and can no longer live under our cliffs like we used to.

In his opinion:

If the rubber takes over all the forest, then we will have no option, we will have to adapt as we will have no choice. We hope there will be no further encroachment because the Forestry Department will stop them, although we are not sure.... they [farmers] are cutting trees every day. They are still encroaching, so we will have to change our lifestyle. But for now we are OK, there is still some forest, although the future is not clear.⁵⁷

Health and education

The authors gained only a very basic idea of the belief system of the Mani. Traditionally they buried their dead and then abandon the settlement 'to avoid ghosts'. In Kwan Mae

■ *Mani in Klong Tong / Marcus Colchester*

Dam the authors were told that they believe when they die they 'go to the rainbow', which is why rainbows are made up of so many different colours.

The Mani also expressed considerable mistrust of modern medicine, saying they preferred their own herbal remedies from the forest. Interviewees repeatedly expressed particular concern about the taking of blood samples and injections. Apart from the Mani of Klong Tong, the Mani lack ID cards and so have limited access to the State medical service in any case. However, when the local public health officer visited the Mani at Kwan Mae Dam and told them to come down to the school for health checks, they declined, being concerned that blood samples might be taken: 'so we ran away back to the forest'. In Manang District in Satun some Mani do have ID cards and have accepted health

care but they are still concerned about blood sampling. In Klong Tong, where the people have ID cards, they make use of the lowland medical centre if they are seriously ill, for example with malaria, but for less serious conditions prefer using medicines from the forest.

Some of the younger Mani have had experience of schooling and a few are now literate, but parents expressed a reluctance for their children to attend the village schools in the valleys, as they will be exposed to discrimination 'and we are afraid they will get hit by a car as we are not used to cars.' In Klong Tong, the Mani are now provided with a teacher by the Department of Non-Formal Education who comes three times a week to provide schooling. There is also a Border Patrol Police school nearby which takes in some pupils.⁵⁸

All the education in these schools is in the Thai language and none make any provision to teach in Mani (unlike in northern Thailand where bilingual education in indigenous peoples' village schools has begun to be accepted by the Ministry of Education).

The Mani in Klong Tong admit that many of them are beginning to lose their own language. While the elders are still fluent, those in their 30s and younger use the language less and less - they can understand it but don't really speak it. They nevertheless still consider themselves to be Mani. Some of the elders interviewed said they felt sad that their grandchildren could not speak their own language.⁵⁹

Social organisation and representation

From what the authors were told and could observe, Mani social organisation is non-hierarchical and relatively egalitarian. Most settlements are made up of a few intermarried clans or families but in each place – the authors were told – there is a headman who is considered the leader of the community and who makes decisions on behalf of the group.⁶⁰ However, marriages

are chosen by the couple concerned, though they will seek the agreement of their parents, and there is no ritual or formal wedding. The couple merely announce their intentions and set up house together.

The headmen whom the authors interviewed seemed quite modest and unassertive individuals, and in the few community meetings that the authors observed or precipitated were attentive and listened to others rather than insist on being heard first. From the authors' observations it seems their authority as community representative is quite limited. As one headman observed 'we have a simple life and we don't fight each other.'⁶¹

The Mani have no formal organisation above the community level through which to represent themselves or be taken into account by State agencies. In the past two years, the Mani have been invited by the indigenous peoples' organisations of northern Thailand to send representatives to the national Indigenous Peoples' Day events held in Chiang Mai in 2011 and Bangkok in 2012. On both occasions those who attended were recruited through the same lowland Thai contact, who facilitated the authors' own survey.

Government policy

The indigenous peoples of Thailand live in three geographical regions of the country. These include: indigenous fisher communities and a small population of hunter-gatherers in the south of Thailand including Mukan, Koken, U-rak-la-woy and Mani; the many different highland peoples living in the north and north-west of the country including Hmong, Mien, Lisu, Lahu, Akha, Karen, Lua and Mrabli; and a few groups in the north-east, including Kuy, Saek and Yattkru. According to the official survey of 2002, there are 923,257 "hill tribe people" living in 20 provinces in the north and west of the country. There are no figures available for the indigenous groups in the south and north-east.

In Thailand, there is as yet no law or policy recognising and protecting the rights of indigenous peoples, although the new Constitution passed in 2007 (Part 12 on Community Rights) refers to “traditional communities” but not specifically to indigenous peoples.

The existing policies and laws of the Thai government have been largely based on the misconception that indigenous peoples pose a threat to national security as drug producers and destroyers of the environment. Policies and laws therefore aim to control and assimilate them into mainstream society. For example, they are encouraged to stop practising shifting cultivation, and instead adopt alternative livelihoods in order to reduce pressure on forest resources. The provision of a modern education aimed at making them into ‘normal’ Thai citizens is part of this same programme. Many of these plans and programmes are in fact not responding to the problems of indigenous peoples and, on the contrary cause a negative impact on them. The Mani people are not an exception.

The local Government has a conscious policy of encouraging the Mani people to form permanent settlements and abandon their foraging way of life. According to local government officials the main barrier to their resettlement programme comes from the Mani themselves who are unfamiliar with the market and remain dependant on wild yams. Whenever wild yam supplies are exhausted in the local forests within a five kilometre radius, the Mani will move off.

In line with its policy of encouraging the Mani to settle down, the local government in Kwan Mae Dam has a policy of offering Thai identity cards only to those who have agreed to settle. To date, in Trang Province, the only group which has acceded to this policy is the group at Klong Tong. For those with ID cards the government then has a policy to provide them with health care in local health centres and provide teachers to the community through the Non-Formal Education programme. The

local government may also provide limited food supplies on an ad hoc basis when appealed to but not as a regular programme. Funds for these initiatives come from the normal local administration’s budgets and not from any specific central government programme.⁶²

According to the Mani in Kwan Mae Dam, they were offered Thai ID cards by the local administration but they refused them.

If we accepted Thai citizenship, we would have to be subject to Thai rules [laws] and then we might be prevented from hunting. So we refused that offer. Khun Chaliew says that there might be a special arrangement for us and we would not be prevented from hunting, but we are not sure about that and are afraid the rules might be imposed on us.⁶³

The other role for the Mani being promoted by the local government is tourism. Palian district was officially opened as a New Tourist Area on 28th December 2012 with a visit by 40 tourism agencies. The local government asserts that this is good for the Mani as they will gain money from the industry which will improve their life and ‘they will be able to learn to stay with other people, learn to trade and deal with the market’.⁶⁴ The fact that they assimilate into Thai society is considered more important than maintaining their cultural distinctiveness as a tourist attraction.

Conclusions

Rapid expansion of plantation crops such as rubber and oil palm in southern Thailand is contributing to an equally rapid loss of forests. Much of this forest clearance is illegal, as the forest areas are classed as forest reserves and watershed forests. The plantations are being opened up by both local Thai and ethnic Thai settlers coming from other parts of the country. Local forestry officials appear to be turning a blind eye to this forest loss, while local government officials and politicians encourage this expansion as it

increases revenue for administration and builds supportive electorates among their constituencies.

This forest clearance and encroachment is having a major impact on the Mani, as they depend on wild animals and forest products for hunting and foraging. Forest loss undermines their food security, their way of life and threatens their survival as a distinct people.

Under the pressure of this rapid takeover of the lands and forests that they have traditionally occupied and used, the Mani are adjusting by adopting limited subsistence farming and producing rubber. They are also working in neighbouring plantations and for local tourism concerns. Those Mani the authors talked to obviously regret this loss of forests and the threat this poses to their traditional livelihoods, culture and identity. Their future is uncertain in the absence of a policy or law that specifically recognises their rights and protects them from such vulnerable conditions

Recommendations

There are many matters that this short study was not able to examine in detail. As a preliminary study about the situation of the Mani people, it only provides a glimpse into their vulnerable situation. Hence, the recommendations provided below are based only on these limited observations and are far from exhaustive.

The authors believe that to be able to survive in this changing situation, the Mani people have to get themselves organised and be empowered.

An in-depth study on the Mani people should be undertaken in the three provinces to understand more about the situation they are facing. This should be carried out in close collaboration with Mani people and their leaders and with concerned local authorities. The outcomes of the study should be used for planning and

strengthening the Mani people themselves. Actions also need to be taken to strengthen the capacity of young Mani and provide them with the necessary skills that could help them voice their concerns and strengthen alliances and coordination with concerned agencies, including with the Network of Indigenous Peoples in Thailand (NIPT) to resolve their problems. All such interventions need to be planned and discussed with Mani people themselves.

Appropriate support should be provided to Mani people to help organise themselves in order to find ways to solve their problems. For this, there should be an appropriate forum(s) or platform organised for them to discuss among themselves internally on their issues and concerns and on how they want to resolve them.

In the meantime, the national forum which is promoting sustainable palm oil in Thailand should take steps to curb the illegal expansion of oil palm and rubber plantations in the forests in southern Thailand.

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Endnotes

1. Interviewee in Satun Province, 15th January 2013.
2. McKinnon and Bhruksasri 1986; McKinnon and Vienne 1989
3. Haberkorn 2011; Pye 2005.
4. McCoy 1984; Tapp 1986.
5. Sturgeon 2005.
6. Forsyth and Walker 2008.
7. Gray and Ridout 2012.
8. Missingham 2003.
9. Dallinger 2011.
10. The authors would like to thank in particular Khun Chaliew Inpang, who acted as their local guide and translator and whose detailed knowledge of the Mani was key to this study, and Tau Poy, who showed the authors around the communities in Satun. The authors would also like to thank Khun Sanit Tongsem, the headman of Kwan Mai Dam village and his adviser Khun Danang Chuon, as well as Khun Madiah Phetpring of Kwan Mai Dam and Khun Kening Kandai of Wong Sai Tong tourist resort.
11. Bishop and Peterson (2003) spell their name 'Maniq'.
12. Carey 1976.
13. Endicott 1979; Howell 1989.
14. Ibid.
15. Ricklefs et alii 2010
16. Nicholas 2000; Oppenheimer 2000.
17. Albrecht & Moser 1998. While suggestive, the archaeological material does not prove that it was direct ancestors of the Mani that were the occupants of these caves.
18. The term 'Semang', which is used to refer to the closely related Orang Asli groups of Malaysia and Yala Province in Thailand, is likewise thought to derive from the Khmer term for 'debt slave' (Ghani 2010), suggesting that both the Khmer and Malay kingdoms used to have similar relations with the forest peoples of the interior.
19. <http://www.lib.ru.ac.th/trang/tranginfo/forest.html>
20. Reid 1993 (two vols), Andaya 2008.
21. Gray and Ridout 2012.
22. Bishop and Peterson 1999.
23. Winichakul 1997.
24. Loos 2002.
25. www.vcharkarn.com/vcafe/36920
26. Bernartzik and Ivanoff 2005; Evans 1937; Schebesta 1928.
27. Chandler 2000; Reid 1993 (two vols); Scott 2009.
28. Carey 1976.
29. Carey 1976; Chapman 1957; Taber 1970..
30. Interviews in Kwan Mai Dam Mani camp 14 January 2013; interview with Khun Madiah, 17th January 2013.
31. Duangchan 1990.
32. Sahlins 1976.
33. Interview with Khun Madiah, 17th January 2013.
34. If true this would extend the known range of this genus.
35. The authors' brief survey only identified a few aspects of Mani livelihoods which in many respects seem like that of the Batek across the border in Malaysia (Endicott and Endicott 2007).
36. Maneenoon *et al.* 2008.
37. Interviews Kwan Mai Dam, 14th January 2013.
38. This account is built up from three separate interviews, with Klong Tong residents, with the local government and with the nephew of a Thai who married into the Mani community of Klong Tong.
39. Interviews Kwan Mai Dam, 14th January 2013.
40. Interview Kening Kandai, 15th January 2013.
41. Interview with Poi in Wong Sai Tong, 15th January 2013.
42. Boi's younger brother, 15th January 2013.
43. Interview with Poi in Wong Sai Tong, 15th January 2013.
44. Groups marked with an asterisk (*) were those actually visited in the authors' survey. The numbers for Patthalung, which the authors did not visit are particularly approximate.
45. Interview with Poi at Wong Sai Tong forest camp, 15th January 2013.
46. Ibid.
47. Interview with Khun Madiah, 17th January 2013.
48. Dove 2011.
49. The local farmers in Kwan Mai Dam seem to be getting a low price for their FFB from the middlemen who take them in bulk to the mills. The current national prices are between Bt 4 and Bt 4.35 (*The Nation*, 19th January 2013 '100,000 tonnes palm oil set for release').
50. Source: <http://www.seub.or.th/index.php>
51. Lohmann 1993
52. Interview with Khun Madiah, 17th January 2013.
53. Interview with Tau Chai, 16th January 2013.
54. Interview with Mani elder in Phu Pha Pet, 15th January 2013.
55. Interview with Poi, 15th January 2013.
56. Interview with Sanit Tongsem and Danang Chuon, 17th January 2013.
57. Interview in Kwan Mai Dam, 14th January 2013.
58. Interviews with Tau Yaa and Tau Chai in Klong Tong, 16th January 2013.
59. Interviews in Klong Tong, 16th January 2013.

60. Bishop and Peterson, 1999, note that the role of headman is inherited patrilineally.
61. Interviews Kwan Mai Dam, 14th January 2013.
62. Interview with Sanit Tongsem and Danang Chuon, 17th January 2013.
63. Interviews Kwan Mai Dam, 14th January 2013.
64. Interview with Sanit Tongsem and Danang Chuon, 17th January 2013.

12 Sime Darby oil palm and rubber plantation in Grand Cape Mount County, Liberia

Tom Lomax, Justin Kenrick and Alfred Brownell

Introduction

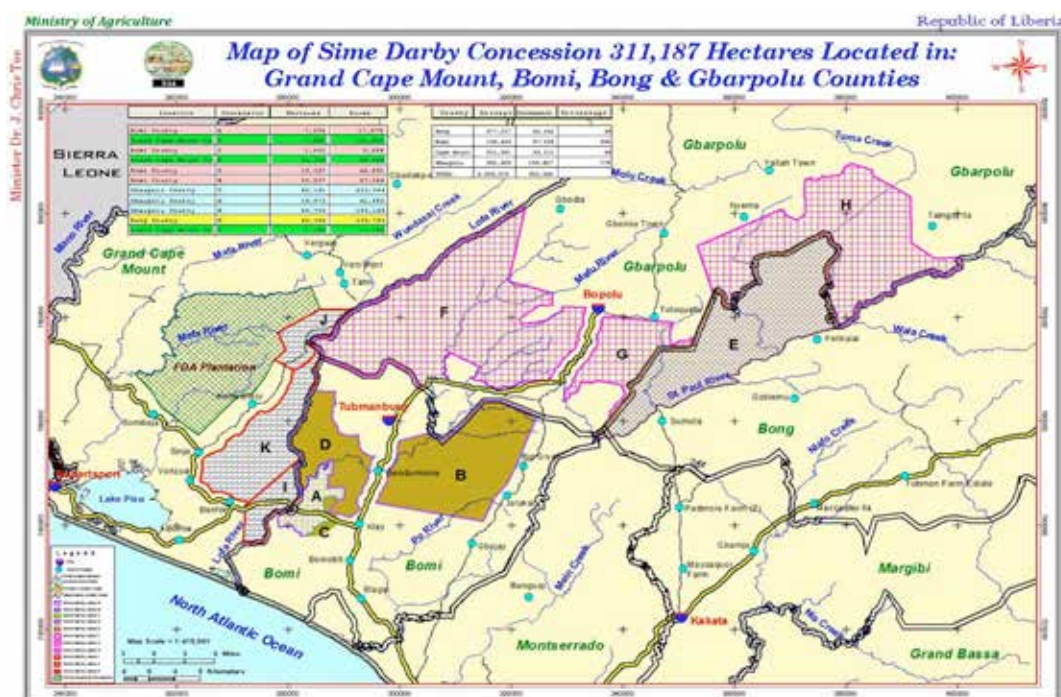
Sime Darby's oil palm and rubber concession in Grand Cape Mount county in northwest Liberia has come under sharp national and international focus after a complaint was submitted under the RSPO New Plantings Procedure (NPP) in November 2011. The complaint, submitted by communities affected by the concession, claimed that their Free, Prior and Informed Consent (FPIC) had not been sought, and that the destruction of their farmlands by the company in order to plant palm oil was leaving them destitute. Sime Darby's concession also includes land in the neighbouring counties of Bomi, Gbarpolu and Bong – see opposite for map of Sime

Darby's gross concession area. This case study, based on field research conducted in February 2012, assesses the nature and extent of community involvement in the acquisition of land for Sime Darby's concession in Grand Cape Mount, in particular with regard to whether the right to Free, Prior and Informed Consent was respected.¹ See page 315 for Sime Darby's own map of the new plantings area and affected towns in Grand Cape Mount county.

Liberia is known to have the best remaining examples of the 'Upper Guinea' forest.² Grand Cape Mount and neighbouring Gbarpolu contain one of the two remaining large forest areas in Liberia, and land in and around Sime Darby's operations in Grand Cape Mount includes mixed shifting cultivation and forest. Liberia's natural resource governance, and in particular the trades in diamonds and timber, played a significant role in maintaining the fourteen-year armed conflict in Liberia and the region,

■ *Remains of an abandoned house in Sime Darby's palm oil plantation. A nearby well and remnants of sugar cane, banana plants and lime trees growing between the young oil palm trees evidence previous community use and occupation / Tom Lomax*





which led to the UN Security Council placing sanctions on timber, diamonds and arms in 2003.³ Poor governance in relation to land and resources, including corruption and bias along ethnic lines, and government policy leading to a sudden rise in the price of food are seen as some of the key triggers for fourteen years of civil conflict which ended in 2003. The conflict caused over a quarter of a million deaths and led to more than 1.3 million people being displaced from their homes.⁴

The communities and their historical relationship to the land and customary norms

The principal ethnic group among the affected communities in the Grand Cape Mount is the 'Vai', one of the sixteen principal tribal groups in Liberia.⁵ These groups are distinct from the descendants of freed slaves from the United States of America who settled in Liberia in the early nineteenth century under the initiative of colonisation societies set up for this purpose. The affected communities also include individuals from other parts of Liberia and from other ethnic groups, who have moved into the area as a result of internal displacement from the civil

■ Map of Sime Darby Concession 311,187 Hectares Located in Grand Cape Mount, Bomi & Gbarpolu Counties / Government of Liberia's Ministry of Agriculture

war (including ex-combatants), as well as economic migrants such as those seeking employment from Sime Darby.

The largest settlements in the area are known as towns, with a collection of towns making up a clan. The affected area comprises eighteen towns in the Garwula District who are all part of the Vai 'Manobah' clan. Traditional land use practices and settlement patterns are dynamic and change over time. Some areas, for example, have been impacted by the development of the BF Goodrich rubber plantation in 1954, now incorporated into Sime Darby's concession area.

The affected towns and villages and adjacent communities engage in multiple and overlapping land uses. As well as shifting agriculture for subsistence food crops (eg cassava, rice, okra, 'bitter ball'- a kind of aubergine, peppers, maize etc.), families will often also grow cash crops (eg sugar cane, cocoa, rubber, oranges, mango, avocado, kola nut and native oil palm).

Cash crops are planted by community members to meet future cash needs, for example as a kind of pension/insurance for when they are unable to do the more heavy work of growing cassava etc., and/or as an inheritance that can benefit the next generations ('my grandfather planted the mango trees for me'). Communities use the cash earned from selling cash crops to pay for school fees, health care and other items that need to be bought.

Hunting and gathering are also very important for food, building materials and fuel. Wet lands are used for fishing and for gathering crayfish, for growing seasonal crops of rice and maize, and for gathering rattan and roofing materials. It was reported that before the clearing by Sime Darby, bush-meat from the forested areas was so plentiful that there was a surplus. Forested areas also provide poles for building houses, wild fruits, edible nuts and tubers, traditional medicines, and wood for fuel and charcoal, the latter being used or sold.

Particular forested areas are also set aside as sacred forests, for ritual use by secret male or female societies. In one town visited for this study, for example, a holy woman referred to as a '*zoe*' spoke of one such sacred forest for women and girls where men were forbidden from entering. One important use of this area was as a birthing place where women were assisted in their labours by the *zoe*. Sacred forests are also vital in passing on cultural knowledge such as practical and social skills, including the *Vai*'s unique script.

While some of the land has some form of deed or tribal certificate, most does not and is instead under customary tenure. These areas, including forest land, wetlands and swamplands, are mostly owned and used collectively by the local towns. Decisions over land are referred to village chiefs and councils and in some cases involve consultations with the whole community. Adjacent to the affected area is the former BF Goodrich/Guthrie rubber concession.

Vai communities are generally tolerant of incomers from other ethnic groups, who learn the *Vai* language, and over time come to be considered as members of the same community. In contrast, this was not the case for incomers seeking employment at the Sime Darby plantation. The perception was that 'outsiders' made up a disproportionate number of permanent Sime Darby employees, and that local communities were frequently only able to get casual 'day labour', and even then only for limited periods. In addition, local community members reported that Sime Darby were contracting truck drivers from the ethnic *Mandingo* community (also known as *Mandinka*) from outside the affected area.⁶ They also disliked the fact that senior Liberian Sime Darby staff commuted from Monrovia to and from the plantation area, and did not live amongst the community.

State institutions and customary governance in Grand Cape Mount county

The affected area is a mix of undeeded customary land, concession areas and deeded land. It is understood that some of the towns or villages in the vicinity have acquired tribal certificates for some of their land, but that undeeded customary lands make up the majority of the affected area. The immediate day-to-day governance of these areas is managed by the communities themselves. Customary governance occurs at various levels, ranging from the local village chief, to the Town Head, Clan Head and then Paramount Chief. Paramount Chiefs preside over the chiefdom or district, which are usually composed of at least two or more clans. There are six Paramount Chiefs in Grand Cape Mount county. Two Paramount Chief jurisdictional areas (the districts of Garwula and Gola Konneh respectively) lie within Sime Darby's operational areas. The Traditional Council is a body composed of chiefs and traditional elders, as well as the holy women, *zoes*. The leadership of the tribes is structured in such a way that the chief is similar to a king but

presides over a Council made of elders, *zoes*, women, youths, and skilled individuals such as hunters, healers and lead farmers.

The non-customary, formal local authorities operate at the district level, county level, and then at central government level. There are also local senators and legislators who represent the administrative sub-units, or counties. Each of the fifteen counties in Liberia elects two Senators who represent that county. There are two senators and four representatives in the Grand Cape Mount county. In terms of land, the highest authority in the district is the District Land Commissioner, above whom lies the County Land Commissioner and the County Superintendent. In central government, the executive bodies and other government agencies responsible for matters relating to land include the Ministry of Lands, Mines and Energy (MLME), the Ministry of Agriculture, the Ministry of Internal Affairs, the Lands Commission, the Forestry Development Authority (FDA) and the President's Office.

For the most part, the local and national authorities are only involved in undeeded customary land areas in the study area when communities or individuals apply to formalise their land ownership (by applying for a Public Land Sale Deed, having first sought a Tribal Land Certificate), or where the government decides to grant forest, mining or agricultural concessions to a third party. Community land is perceived by customary communities as belonging to them and subject to customary rules whether it is formally deeded or not. By contrast the clear countervailing perception from most government bodies is that all undeeded land is public land belonging to the government.

The national legal framework on the acquisition of customary lands and resources

As exemplified in this case study, the dominant government perception of customary lands is that where they have

not been formalised in some way, they are considered 'public land', with communities holding only usufruct/possessory rights, but not proprietary rights.⁷ The government therefore concludes that this land is available for state allocation of long-leaseholds to third parties eg for large-scale agricultural concessions such as Sime Darby's.⁸

The *Public Lands Law* does not define 'public lands', but implicitly considers public lands as being owned by the government, since the law is concerned with the mechanisms by which public land is acquired from the government.⁹ However, the *Land Registration Law* states that except where otherwise provided, 'all unclaimed land shall be deemed to be public land until the contrary is proven'.¹⁰ Under the *Land Registration Law*, land free from private rights are to be recorded as public land, and if the land is subject to 'tribal reserves' or 'communal holdings', these shall be recorded.¹¹ This suggests that customary rights as expressed as 'tribal reserves' or 'communal holdings' will be considered possessory or usufruct titles on state-owned land.

Given the unresolved legal position of customary communities' under the *Hinterlands Law/Aborigines Law*, customary land rights are highly vulnerable to being overridden as 'public land' and allocated to third parties by government. Communities can formalise their rights using the *Public Lands Law*'s procedure for obtaining a 'Public Land Sale Deed'. However, this procedure is lengthy, costly, and bureaucratic, and therefore prohibitive for many rural communities.¹² It also requires the applicant community to 'pay a sum of money as token of his good intention to live peacefully with the tribesmen', and for the District Land Commissioner to be satisfied that the land does not form part of the Tribal Reserve and is not otherwise owned or occupied. Clearly this procedure is ill-suited to a tribal community claiming a pre-existing entitlement to the land, by virtue of long-standing customary connection to the land area.

In its provisions for the purchase of public lands, the *Public Lands Law* perpetuates the anachronistic and discriminatory distinctions between *immigrant* and *aborigine* and between *citizens* and *aborigines who become civilised*. This includes the ‘settler advantage’ conferred on immigrants, who are entitled under the *Public Lands Law* to a specified amount of land, in comparison to non-immigrant Liberians (‘aborigines’) who would have to purchase lands unless they were ‘aborigines who have become civilised’. Even the latter have disadvantageous terms relative to the immigrant settler.¹³

Customary communities are afforded the most protection under the national legal framework relating to forest resources, in particular the *Community Rights Law of 2009 with Respect to Forest Lands* (CRL). In its guiding principles, the CRL states that

Any decision, agreement, or activity affecting the status or use of community forest resources shall not proceed without the prior, free, informed consent of said community.¹⁴ Forest resources are to be managed and developed to ensure equitable distribution of benefits, and encourage active participation of society.¹⁵

Although elaborating a progressive series of provisions and procedures in respect of community rights over forest lands, the implementation of the CRL has not lived up to expectations, not least because of the lack of consistency with the national laws relating to land and lack of progress in clarifying land tenure.¹⁶

To lease public land to foreigners or foreign companies, there is no requirement to demonstrate that the land is not encumbered by, for example, being ‘tribal land’, so such leases can be ‘lawfully’ granted on tribal/customary lands on the President’s authority when ratified by the Legislature.¹⁷ Although land containing ‘tribal land’ can be leased to foreign companies, it cannot be sold. This is an inadequate safeguard for communities, since a lease for a renewable term for a maximum of fifty years is de facto

dispossession.¹⁸ The Sime Darby lease is for a period of sixty-three years, renewable for a further thirty years, in apparent breach of this fifty year legal limit.

Customary rights derive some protection from both constitutional provisions and international law. Liberia’s 1986 Constitution sets out a number of relevant general principles that must be observed by national law, policy and practice. These include injunctions for the State to ‘preserve, protect and promote positive Liberian culture, ensuring that traditional values...are adopted and developed’, which would provide clear support for building on (and certainly not undermining) progressive customary rules and systems.¹⁹ The Constitution also mandates national courts to apply customary laws in addition to statutory laws.²⁰

Furthermore, the Constitution directs that the Republic shall, ‘consistent with the principles of individual freedoms and social justice..., manage the national economy and the natural resources of Liberia in such a manner as shall ensure *the maximum feasible participation of Liberian citizens* under conditions of equality as to advance the general welfare of the Liberian people’.²¹ This could be used to argue for the Free, Prior and Informed Consent from communities in negotiations over natural resource management. It is also arguable that where certain projects create a disproportionate cost burden on a particular ethnic group (such as the *Vai*) when compared with the wider distribution of benefits, the constitutional principle of equality would also protect that group from discrimination of this nature.

The Constitution also provides for the inalienable right to possessing and protecting property.²² All persons have the right to own property alone or in association with others, however only Liberian citizens have the right to own real property.²³ There is nothing in the wording of these rights that precludes collective property rights over customary lands. The Constitution does provide for expropriation of land on public

purpose grounds (sometimes referred to as ‘eminent domain’), however in such cases appropriate procedural safeguards must be observed: reasons must be given for the expropriation; just compensation must be promptly paid; expropriation may be freely challenged in the courts without penalty; and the former owner has first refusal to re-acquire the property if public use ceases.²⁴

Implementation of the constitutional principles of community use of natural resources is included in the national laws on environmental protection. The *Environmental Protection Agency Act* (2002) provides that ‘[e]very person in Liberia has the right to a clean and healthy environment and a duty to take all appropriate measures to protect and enhance it’.²⁵ The *Environmental Protection Act* (2002) also sets out a number of key principles for environmental management.²⁶ The principles most relevant to the customary rights of communities include:

- Ensuring compliance with international environmental treaties, which implies observance of the *UN Convention on Biological Diversity* (CBD) including Articles 8(j) and 10(c) under which the State of Liberia is obliged to respect and protect traditional lifestyles and customary sustainable use of biological resources by local and indigenous communities;
- Ensuring respect for the cultural and spiritual; and,
- ‘Encouraging and ensuring maximum participation by the people of Liberia in the management and decision making processes of the environment and natural resources’, echoing Article 7 of the Constitution (as outlined above).

These principles are reflected in the key functions of the Environmental Protection Agency (EPA) which is responsible for ensuring proper environmental management and protection. These functions include implementing the environmental impact assessment (EIA) process; preserving the historic, cultural and spiritual values of natural resource heritage; enhancing

indigenous resource use in consultation with indigenous authority, and ensuring public participation in decision making on the sustainable management of the environment.²⁷

Communities derive a number of substantive and procedural rights from the national law relating to the EIA process. Liberia’s environmental laws have set forth a procedure for public participation and involvement in the approval or rejection of development projects. The *Environment Protection Act* specifically highlights the importance of public participation and seeks to encourage and ensure maximum participation in the management and decision-making processes including exposure to agency information.²⁸ Before a project commences, the project facilitator must submit an EIA to the EPA. The EIA requirement is a multi-stage process. This process is mandated in sections 6 to 30 of the *Environment Protection Act*. If carried out correctly, the EIA process is capable of facilitating significant public participation.

Large-scale mono-crop projects such as Sime Darby’s cannot commence without having fulfilled the requirements of the EIA process, which if approved by the EPA result in award of an EIA license.²⁹ The process has numerous steps commencing with an application to undertake an environmental impact assessment and publication by the project proponent of a ‘notice of intent’ containing sufficient information to allow a stakeholder to identify their interest in the proposed project.³⁰

For projects that will or are likely to have a significant impact, or for projects whose scope or size warrants public consultation, an ‘Environmental Impact Study’ is required.³¹ Prior to carrying out this Study the project proponent is required to provide a Notice of Intent. The Notice of Intent is the first public action completed by a project applicant and must be published. The purpose of publishing the notice is for the project applicant to make stakeholders aware of the project. The *Environment*

Protection Act explains that the content of the notice must ‘state in a concise or prescribed manner information that may be necessary to stakeholder or interested party to identify its interest in the proposed project or activity’.³²

The project proponent must then submit a ‘project brief’.³³ The project brief is first submitted to the EPA by the project proponent. The EPA will then transmit a copy of the project brief with comments and questions to Line Ministry and make copies of project brief available for public inspection and comments.³⁴

The next step is that the proponent must undertake a public consultation ‘scoping exercise’ to inform the terms of reference of the Environmental Impact Study and Impact Statement. Included in the stated purpose of this public consultation is for the scoping exercise to ‘identify, inform and receiving input from the affected stakeholders and interested parties’, ‘identify and define, at an early stage of the EIA process, the significant environmental issues, problems and alternatives related to the different phases of the proposed project or activity’ to ‘ensure public participation early’ in the EIA process, including adequate measures ‘to seek the views of the people who may be affected by the project during the study’.³⁵ This exercise must include the following steps relevant to community participation:

- Publishing the intended project and its anticipated effects in district media;
- Holding public meetings to consult communities on their opinion the project, via the County and District Environment Committees;
- Incorporating the views of communities into the report of the study.

On completion of the Environmental Impact Study, the project proponent is required to submit an ‘Environmental Impact Statement’ and an ‘Environmental Mitigation Plan’ to the EPA.³⁶ The Environmental Impact Statement is the principle document on which further public

participation is sought by the EPA, which must publish a notice seeking comments, disseminate the Statement to communities via the County Environment Officers and the County and District Environment Committees, and hold public hearings for those most likely to be affected.³⁷ Having considered all comments received, the EPA decides whether to hold a formal public hearing.³⁸ The summary report of the public hearing is considered by an EIA Committee which must include at least one person who is based in the area to be affected by the activity, and a representative from the project proponent.³⁹ The opinion of the EIA Committee is subsequently considered, whereupon the EPA publishes its reasoned decision on whether the project has been approved for an EIA license or not.⁴⁰

Although there is a right of appeal against an EPA decision to grant a license, the time-scales for appeal are short. In addition, there are no arrangements for local communities to appeal in the vicinity of their communities and in most cases must travel to Monrovia requiring long journeys and poor road conditions and associated expense, thus decreasing the accessibility of the appeals process to rural communities. Furthermore, the law does not disclose any mechanisms for ensuring that the EPA’s reasoned decision and other key documents such as the environmental mitigation plans are directly communicated to communities in a language and form that is appropriate to those communities, further impeding access to information and the possibility of appeal. Finally, although the environmental protection laws required the establishment of an environmental appeal court, this is yet to be set up since the environmental law came into force in 2003.

Despite the limitations in the process outlined above, the EIA procedures do provide a basis for information provision and consultation in the decision-making processes surrounding the grant of an EIA licence. Clearly these procedures when taken together would not guarantee respect for the communities’ right to Free,

Prior and Informed Consent. A complete analysis of the application of the various stages required by the EIA process in the case of Sime Darby's concession in Grand Cape Mount is beyond the scope of this study. However it is clear from the findings of this case study, in particular from the community feedback in Section 8, that communities were not adequately informed or consulted either by the company or their agents (such as the consultant who carried out the company's impact assessment) or via the official EIA process. This suggests that the current EIA procedures and/or their implementation were inadequate in delivering a process of effective community information, participation and consultation.

Summary of international legal framework

In terms of accessing rights from the international law framework, Liberia has a dualist system whereby international laws need to be incorporated into domestic law to be enforceable in the Liberian courts.⁴¹ However international laws ratified by Liberia remain binding on the state whether they have been incorporated into national law or not. Relevant international legal instruments formally incorporated into domestic law include the following as confirmed at the time of writing:

- African Charter on Human and Peoples Rights (ACHPR)
- International Covenant on Economic, Social & Cultural Rights (ICESCR)
- International Covenant on Civil & Political Rights and Optional Protocol (ICCPR)
- UN Convention on the Rights of the Child (CRC)

Liberia has also ratified or has otherwise committed to respecting the following international legal instruments:

- UN Convention on Biological Diversity (CBD)
- UN Declaration on the Rights of

Indigenous Peoples (UNDRIP)

- UN Declaration on the Right to Development (UNDRD)
- UN Convention on the Elimination of Racial Discrimination (CERD)
- UN Convention on the Elimination of Discrimination against Women (CEDAW)

In view of its international commitments, the government of Liberia is obliged to protect and promote a number of cross-cutting rights relevant to the process of granting concessions over land and natural resources traditionally used and occupied by customary communities such as those in Grand Cape Mount. These include the basic human rights to the following: property; adequate standards of living (including adequate food, adequate housing and health); culture and religion; self-determination; and development.

Crucially, it is settled law that traditional possession and use of customary land by tribal and indigenous peoples amounts to a property right, in respect of which any activity that may compromise the physical or cultural survival of that people would require observance of the right to Free, Prior and Informed Consent.⁴² International human rights law guarantees all customary communities the right to meaningful participation and consultation in respect of decision-making that has implications for their customary lands and natural resources.

⁴³ This includes the requirement that communities be provided with prior, full, accurate and objective information, in a form and language appropriate to all communities concerned, including information on the negative risks as well as the potential benefits of the proposed activity. It is also a requirement of International law in such cases that a prior and independent cultural, social and environmental impact assessment be completed.⁴⁴ In addition, communities must receive a reasonable benefit and suitable compensation where they have been deprived of traditional property and other rights in respect of customary land and natural resources.⁴⁵

International legal best practice is echoed in the RSPO Principles & Criteria, which place a duty on member companies to respect customary rights to land and only use land with the Free, Prior and Informed Consent of all community members, through processes and agreements that are well-documented and transparent.⁴⁶ For example Criterion 2.3 requires that '[u]se of land for oil palm does not diminish the legal rights or customary rights, of other users, without their free prior and informed consent'. The Principles & Criteria also require that a comprehensive and participatory social and environmental impact assessment (SEIA) be undertaken by an accredited independent expert.⁴⁷ In addition, RSPO-certified palm oil growers are prohibited from using land containing primary forest, or High Conservation Values (HCVs).⁴⁸ Identifying these areas must be integrated into the SEIA process. Importantly for communities, HCV areas also include forest areas *fundamental to meeting basic needs of local communities* (eg subsistence, health etc.); and forest areas *critical to local communities' traditional cultural identity* (areas of cultural, ecological, economic or religious significance identified in cooperation with local communities). Finally, local communities must be compensated in accordance with agreements reached during negotiations that adhere to the right to FPIC.⁴⁹ This should also be integrated into the SEIA process.

Since the end of the conflict and the sanctions placed on Liberia, the UN Security Council has continued to mandate a Panel of Experts to investigate and report back to the Security Council on issues relevant to maintaining peace, security and development in the country, including natural resource governance. This has led to a number of important findings and recommendations relevant to large-scale land acquisition such as the Sime Darby oil palm concession.

In terms of the problems associated with concession allocation in general, the Panel

of Experts has noted the critical problems associated with the lack of clarification of land ownership, including land conflict.⁵⁰ This applies to both new allocations of concessions and extensions of pre-existing concessions, such as Sime Darby's extension of the original BF Goodrich/Guthrie rubber plantation.⁵¹ As such the Panel has recommended a moratorium on allocating further natural resource concessions pending the completion of the Land Commission's land tenure clarification process.⁵² The Panel also notes with concern the general apparent lack of compliance with the competitive bidding processes required by the Public Procurement and Concessions Commission and associated procurement law.⁵³

In terms of the agriculture sector in particular, the Panel observes that it has yet to undergo similar reforms despite suffering from the same governance weaknesses as other sectors.⁵⁴ The current conflict at Grand Cape Mount can thus be seen as a continuation of existing problems in this sector, including violence and human rights abuses at the former Guthrie plantation as identified in the Panel's report. The governance weaknesses referred to by the Panel include a lack of transparency of even basic information on agricultural land planning and contracts.⁵⁵ The Panel notes the challenges even it faced in locating copies of concession contracts. If the UN Panel of Experts operating under a Security Council mandate had such difficulties, rural communities are even less likely to be able to gain access to such basic information.

Further key problems with agricultural concession allocation processes and corresponding recommendations for addressing these, as identified by the Panel, include the following:

- **Consultation and participation:** There are 'no specific legal requirement for multi-stakeholder participation or community consultation with regard to landownership or ex ante social agreements'.⁵⁶ As stated by the Panel,

public participation and consultation of communities and other stakeholders will help bring to light pre-existing land claims or disputes, and prevent land disputes and associated conflict.

- **Benefit sharing:** Despite various benefits being promised (for schools, health care and housing etc.) there is a lack of consistency in the benefits promised; benefits are poorly defined in the contracts in terms of time frame and standards; and they apply only to employees as opposed to the whole affected community.⁵⁷ As the Panel notes, long-term stability and development objectives depend on the population benefiting at the community, regional and national levels.⁵⁸
- **Monitoring:** Negotiation and compliance with contracts and social agreements is not currently overseen by any government ministry, leaving them subject to the goodwill of the company and the negotiating position of communities (which is comparatively weak) and the unions.⁵⁹ The Panel asserts that the 'ability to monitor concessions is crucial on a number of fronts, including ensuring that contracts are allocated and negotiated to the benefit of Liberia and its citizens; that required payments are made by companies; that social, health, education and employment provisions of contracts are met; and that environmental terms and conditions are met'.⁶⁰
- **Regulating private security arrangements:** Finally, given the history of land conflict and potential for violence, the Panel notes with concern the implications of private security arrangements and a lack of transparency in those arrangements. They recommend vetting procedures to exclude individuals from combatant chains of command and/or involved in past human rights abuses, and recommend establishing internal codes of conduct relating to rules of engagement and human rights training.⁶¹

Furthermore, the Panel notes that Sime Darby's concession contract only vaguely defines the land area concerned, deferring demarcation until after the concession has been ratified by the Liberian legislature.⁶² However, as a result of this ratification, the contract enters into Liberian law and the full range of contractual provisions comes immediately into force without the need for a further contract. In its 2010 report the Panel notes the potential for tensions to arise during concession expansion in the context where there is insufficient land for the concession due to pre-existing land use and titles (as was noted by the company itself).

This is born out in the Panel's 2011 report which notes that 'land disputes stemming from a lack of community consultation have long plagued many of the rubber plantations, and have flared up, in particular in connection with the new expansions of the Guthrie plantation by the Malaysian multinational firm Sime Darby'.⁶³ The Panel notes that Sime Darby admit to 40% of the land being subject to overlapping claims, and on informing the government of this, was told to 'sort it out themselves'. This suggests a surprising complacency on behalf of the government of Liberia, particularly given the history of conflict in the area. The government appears to be relying entirely on Sime Darby to sort out complex problems that require far more sensitivity and attention by a number of stakeholders, being based on deep-rooted issues such as the lack of clarity on land ownership and the weak security of tenure position of customary communities. As the Panel states, 'natural resources can only help strengthen the post-war economy and contribute to economic recovery if they are managed well and in an accountable, transparent and sustainable manner'.⁶⁴

A number of other key observations and recommendations have emerged from international jurisprudence specifically in relation to Liberia. These include concluding observations and recommendations of the UN treaty bodies (such as the UN Committee on the Rights of the Child), UN

special mechanisms (ie the independent expert on technical cooperation and advisory services in Liberia), and reports developed under the auspices of the Human Rights Council, including pursuant to Liberia's Universal Periodic Review.⁶⁵ The principal observations and recommendations from this international jurisprudence as relevant to customary land and natural resource rights include observations and recommendations that the government of Liberia should:

- take steps, including legislation to ensure non-discrimination with regards to vulnerable groups, including rural children;⁶⁶ rural women, including employment conditions of women working on rubber plantations⁶⁷ and the needs of rural women to participate in decision-making processes and development planning;⁶⁸
- address the risks of ethnic polarisation, conflict and racial discrimination, including with respect to land and natural resources such as inter-communal boundary and ownership disputes;⁶⁹
- take necessary steps, including land reform, in relation to land rights and land-related conflict;⁷⁰ including in relation to returning refugees and internally displaced persons;⁷¹
- The independent expert on technical cooperation and advisory services in Liberia notes the recent occurrence of land/property related violence and killings, referring to it as a 'worrisome trend' and 'a conflict resolution area deserving of attention'.⁷²
- address the problem of food security;

The independent expert reports that while agricultural production for export is developed, production for food for domestic consumption is undeveloped. Referring to the October 2006 FAO Comprehensive Food Security and Nutrition Survey,⁷³ she states that '[s]tunting affects 39 per cent of children under 5 years of age, 11 per cent of survey household are considered food insecure and 40 per cent highly vulnerable to food insecurity. Seen from a human

rights perspective, a large proportion of the population is unable to enjoy its right to food.'⁷⁴ Food security is further highlighted in her 2008 report, where she adds that '[t]he current situation is being exacerbated by the global food security crisis and the rise in fuel prices.'⁷⁵

- address the human rights problems such as housing, pay and sanitation conditions associated with rubber plantations (including at the Guthrie plantation), and prioritise human rights as well as other factors such as basic services for workers when negotiating these and other concession contracts;⁷⁶

The independent expert makes particular reference to human rights violations on rubber plantations, in particular at Guthrie rubber plantation in Bomi (part of the site now included in the Sime Darby concession area), and the Cavalla rubber plantation, including housing, pay and sanitation conditions.⁷⁷ She reports that 'concession agreements do not systematically include the provision of minimum standards of basic services for workers'.⁷⁸

- domesticate international and regional human rights instruments and ensure that domestic laws are harmonised with the international human rights treaties it has ratified;⁷⁹ and to consider amending the constitution to give immediate effect to international law.⁸⁰

Sime Darby corporate background

Sime Darby is registered in Malaysia and owns a large number of subsidiary companies, including Liberian-registered '*Sime Darby Plantations (Liberia) Incorporated*'.⁸¹ Although engaged in a range of industries, its plantations division accounts for more than half of its profits.⁸² This includes production of crude palm oil, and derivative products, including biodiesel.⁸³ Sime Darby's principal buyers of palm oil include Nestlé and Unilever. As of mid-2009, its land bank in Malaysia and Indonesia amounted to 631,762

ha, the vast majority of it being planted with oil palm.⁸⁴ Sime Darby has now added 220,000 ha of land in Liberia to its plantation estate via the 2009 concession agreement with the Republic of Liberia.⁸⁵ It is also understood that the Republic of Cameroon has made a commitment to providing Sime Darby with 430,000 ha of land in Cameroon for palm oil and rubber, of which 40,000 ha has been allocated.⁸⁶

The principal shareholder of Sime Darby (at the end of September 2009) is Permodalan Nasional Berhad (Malaysia's national investment and Employees Provident Fund).⁸⁷ Other shareholders include/have included investors from Malaysia, Singapore, the United States and the United Kingdom.⁸⁸ Sime Darby has received finance from the following banks: OCBC (Singapore), CIMB (Malaysia), HSBC (UK), and Bank of Tokyo-Mitsubishi UFJ (Japan).⁸⁹

Legal status of Sime Darby's rights to the concession land

Sime Darby's current Liberian concession agreement was entered into on 30th April 2009, and provides a lease of land for 63 years, renewable for a further 30 years. Signed by the acting Minister of Agriculture (Borkai Sirleaf), the Minister of Finance (Augustine Ngafuan) and attested to by the Minister of Justice, the concession agreement provides for land totalling 220,000 ha. This 2009 concession is referred to as an 'Amended and Restated Concession Agreement' as it incorporates 120,000 ha of land that was the subject of a previous concession agreement dated 9th July 1954 with B.F. Goodrich. The 1954 concession was subsequently transferred to Guthrie Ltd UK, and then to Guthrie Kumpulan Sendirian Berhad (parent company of Guthrie Ltd UK), subsequently known as Kumpulan Guthrie Berhad (KGB). The 1954 concession agreement was amended on 22nd November 1985 to reflect assignment of concession rights. The area planted with rubber amounted to around 20,000 acres. On 30th October 2001, KGB gave notice that it was temporarily

suspending operations due to the security situation in Liberia, whereupon government officials provided interim management. Sime Darby Berhad acquired KGB in November 2007.⁹⁰

Sime Darby states that its operation in Grand Cape Mount currently amounts to around 12,514 ha. This includes 7,785 ha of the former Guthrie/BF Goodrich rubber plantation. Sime Darby has embarked on clearing and planting 10,000 ha of land adjacent to the existing rubber plantation in Grand Cape Mount and Bomi counties, of which at least 4,000 ha have now been cleared for planting. Clearing was ongoing during the fieldwork for this study in February 2012. Sime Darby's gross concession area in Grand Cape Mount amounts to 39,010 ha, which is around 13% of its total gross concession area of 311,817 ha in Liberia. Of this gross concession area, 159,827 ha (51%) is planned in Gbarpolu County, 57,008 ha (18%) in Bomi County, and 55,342 ha (18%) in Bong County.

Although a comprehensive summary of the contract and its limitations is beyond the scope of this study, a number of key terms that are present in the contract, as well as many important omissions, render it fundamentally inconsistent with the international commitments of both the government of Liberia and Sime Darby. In the case of the government, these include the international treaty commitments and related jurisprudence (as set out in section (5) above) which entail protection of a number of cross-cutting human rights relevant to community rights over customary lands and resources. In the case of Sime Darby these commitments include its corporate responsibility to respect the human rights protected under international law⁹¹ and its obligations as member of the RSPO.

A central problem is that the provisions clearly imply that the government of Liberia considers that the concession area is in its gift. The contract clearly neglects to accord due respect to the rights of

customary communities over their land and resources in the concession area or assumes that these rights can be inevitably defeated by the government. This is implied by a number of provisions, including inter alia the following terms:

- assuming the government's right to grant a leasehold over the concession area to Sime Darby (Section 20)
- reserving ownership for the government of non-moveable assets on expiry or termination of the contract (Sections 3.3 and 27.1);
- allowing government to repossess unused land (Sections 8.5 and 8.6);
- providing government warrantees to provide land free of encumbrances, and warrantee the companies' title to, possession and quiet enjoyment of the concession area (Sections 4.1(c) and 5.6);
- granting Sime Darby a right to request resettlement of existing communities, if it can demonstrate that they would 'impede development' of the concession and 'interfere with the activities' of the companies (Section 4.3); and,
- permitting local communities to farm on land within the concession providing they seek the consent of the company, and even then only for non-commercial uses (Section 8.10).

At the same time the contract fails to provide adequate social safeguards. There is no requirement that this 'government contract' be subject to an obligatory FPIC process that would lead to a 'social contract' with the communities in the concession area, and no requirements for adequate compensation and benefit-sharing. There are no provisions requiring participatory mapping of existing customary lands areas, identification of land essential to community needs and sacred or otherwise culturally important.⁹² In the absence of such guarantees for meaningful participation in the proposed development projects, the contract constitutes a failure on the part of the government to adequately protect the local communities' human rights, and a failure on the part of the company to observe those same international laws and

the corresponding standards required by the RSPO Principles & Criteria. Essentially there is no incorporation or mention of compliance with the key aspects of international human rights law and the RSPO Principles & Criteria in terms of the treatment of customary rights. For example, the contractual terms regarding resettlement are utterly at odds with the fact that involuntary resettlement is considered a serious violation of international law except in the most exceptional circumstances.⁹³

As detailed in Section 5, environmental and social impact assessments are a key requirement of international law and the RSPO Principles & Criteria in relation to acquisition of community land. It is also a crucial stage in any legitimate process through which a community's right to FPIC is to be respected. Via a consulting company, Sime Darby completed an Environmental and Social Impact Assessment Report (ESIA) in 2010 for the 10,000 ha area of oil palm planned for Grand Cape and Bomi counties.⁹⁴ The ESIA classifies the existing land use as 'subsistence agriculture', and notes that '[a] griculture accounts for more than 90% of the labour force within the project area'⁹⁵ as well as hunting and 'petty trade'.

Accordingly, it notes as potential socio-economic impacts of the project as the following: displacement of people and communities, loss of land and crops, and change in lifestyle and living conditions. The suggested mitigating steps include a resettlement framework policy, FPIC, and defining 'affected people centered resettlement criteria and compensation consistent with Liberian laws'.⁹⁶ The report states that for the purposes of the *current* development of 10,000 ha at Bomi and Grand Cape Mount counties, '[c]onsidering [the] size of the current project and the small number of villages within the project area, Sime Darby will not be implementing resettlement actions immediately' but that 'considering the need for resettlement in future areas of the land... the company has indicated its commitment to upholding international requirements with respect to the development of a Resettlement Action Plan'.⁹⁷



The report also notes water resource degradations and siltation as a possible socio-economic impact, and identifies mitigation steps including good site development (conservation of riparian zones and soil erosion minimisation) and cooperation 'with communities and local authorities on solving water supply issue on the directly affected communities'.⁹⁸ The report also notes that if plantation operational activities are not well managed in relation to water resource degradation and siltation, this could cause 'frequent outbreaks of skin disease and diarrhoea'.

The ESIA also notes that 'people and the state are at odds as to who owns the forests', and that the lack of established mechanisms linking customary and statutory structures making 'local communities potential targets for land and resource grabbing'.⁹⁹ The report goes on to report that compensation

■ *Sime Darby map of towns within the Grand Cape Mount county concession. The nursery is the small block in red above the central housing - the latter is the HQ on the ground which is also the location of Sime Darby's offices.*

for lost crops would be paid according to government defined rates, and highlights that '[b]ased on the loss of agriculture land, the impact of the project on agriculture is considered to be significant within the local context, especially when farmers would have to identify new areas for farming. Mitigation measures are required'.¹⁰⁰ The High Conservation Values Assessment (HCVA) notes the presence of forested areas essential to community needs (HCV 5), and forest areas critical to traditional culture, including burial sites (HCV 6)¹⁰¹, and notes the need for participatory mapping of boundaries.¹⁰²

Sime Darby also sought and obtained the necessary EIA licence from the EPA, allowing it to proceed with the planned development.¹⁰³ The permit was granted despite being disputed by community members in a joint letter dated 18th August 2011, claiming *inter alia* that the project would amount to eviction due to the loss of crop land; that the ESIA consultants failed to give sufficient weight to community concerns in its conclusions; and that the government failed to consult the communities before granting the concession.

In a letter dated 29th August 2011, the EPA contacted Sime Darby accusing it of a 'willful violation of the Environment Protection and Management Law of Liberia', highlighting the lack of a monitoring report as instructed in the EPA permit conditions, and a lack of engagement with the other permit conditions. In a subsequent letter dated 5th October 2011, the EPA imposed a fine of \$50,000 USD on Sime Darby for violations specified in the 29th August 2011 letter that had not been addressed.¹⁰⁴ The EPA letter followed complaints sent by Green Advocates to the EPA that Sime Darby was in violation of the environmental law and the EIA licence requirements.

The right to free, prior and informed consent: a compliance analysis of Sime Darby and the government of Liberia

What has either the government or the company done or not done, to allow recognition of communities' rights to their customary land and/or to give or withhold their FPIC?

Sime Darby

As evident from the concession contract as discussed above, the company's negotiations led to a contract that is inconsistent with international law and RSPO standards, including a failure to recognise community

land rights or provide provisions for respecting the communities' rights to FPIC.

Sime Darby in Monrovia outlined the process through which they had informed the communities, and it seems clear from their account that this process does not satisfy the requirements for FPIC as set out in the RSPO Principles & Criteria, and as described by international human rights law and jurisprudence. The Sime Darby powerpoint outlining the FPIC process, referred to the second step in this process as 'Conduct Propaganda Campaign on the Ground'. In addition, Sime Darby's Liberian manager responsible for FPIC described the process as telling communities that: (1) land will be developed, (2) a portion of land will be left for agriculture, and (3) there will be an 'out-growers' scheme and agro-forestry for the communities.¹⁰⁵ Sime Darby informed communities that their farmland would be left: 'The land in question is not being taken away by Sime Darby forcibly but the farming activities you have carried out will continue to be carried out', and that the improvement will be in 'everyone's living standards: there will be schools, safe drinking water'.

From Sime Darby's explanation it was clear that communities were given the impression that their farm land would remain, and that Sime Darby would be developing land further away from them while also giving them an opportunity to benefit from employment and from taking part in the out-growers scheme.

Sime Darby explained to the researchers they avoided deeded land, and also that 'nobody claims they have customary land'. When asked whether there had been any mapping exercise to find out if there were any customary land claims (as recommended in the company's own ESIA), Sime Darby explained:

No, we'll do that next. The land commissioner will address this. We will ask the Land Commission to do the mapping with Sime Darby and communities next time. We planted on swamps before, not now.

We realised that swamp needs to be left. We can always improve. Sime Darby is waiting for the government to tell us what land to give over.

In other words the company on the one hand acted as though the land they cleared was neither deeded nor held under customary land, and on the other hand acknowledged that they did not carry out the necessary research and consultations to find out whether that was the case, and are clear that they have made mistakes which they are waiting for the government to resolve. Once the land had been cleared without communities' consent (see below) and communities had appealed to the RSPO – through their lawyer at Green Advocates and through the Forest Peoples Programme – to impose a moratorium, there was then a recognition higher up in Sime Darby that there were indeed serious issues to be addressed.

A bilateral meeting between the community representatives and the company on 17th December 2011 sought to find ways of resolving these conflicts. By entering into this process the company demonstrated good faith and a wish to resolve the issues in line with RSPO requirements, arising from what the communities had experienced as a land grab that had not observed their right to FPIC. The presence of senior Sime Darby staff from Malaysia was critical to making this meeting productive. At the meeting, Sime Darby officials agreed to resolve the land conflict in line with RSPO Principles & Criteria, carry out an independent audit of the extent to which FPIC was respected and recognise the communities' own freely chosen representatives as interlocutors for resolving the dispute. The meeting resulted in a scheduled and urgent programme of meetings and other activities between community representatives, Green Advocates and Sime Darby to take concrete steps towards compliance with RSPO standards, as well as emergency measures to mitigate the negative impacts of the development so far.

In practice it is therefore apparent that the basis of the company's attitude and approach

to the land acquisition is that undeeded land belongs to the state and is unencumbered by third party customary rights, such that the state is legally entitled (under the terms of the concession agreement) to grant the company the power to use the land, without needing the consent of customary communities or negotiating fair compensation for loss of customary lands and resources. In so doing, the company is adhering to the government of Liberia's interpretation of national law, and in clear breach of international human rights law and RSPO standards. From the summary above it is clear that Liberia's national law is inchoate, discriminatory and anachronistic at the very least, as well as being in breach of international human rights standards to which Liberia is committed to implementing. Indeed, as highlighted above, the company's own ESIA noted the deficiencies in the national legal framework in relation to customary rights when stating that 'people and the state are at odds as to who owns the forests', and that the lack of established mechanisms linking customary and statutory structures render 'local communities potential targets for land and resource grabbing'. Despite these findings in the ESIA, Sime Darby has failed to take appropriate steps to address and mitigate these known deficiencies in response to these findings.¹⁰⁶

It is clear that Sime Darby prefer the government's interpretation of national law over international law and RSPO voluntary standards. In another example of this the company uses the government compensation rates for loss of crops, rather than establishing fair compensation through a process of fully participatory community negotiations. The table outlining government compensation rates is appended to the Environmental and Social Impact Assessment Report (ESIA).¹⁰⁷ During the course of this study community members showed receipts confirming that crop compensation was paid at these rates, eg \$6 USD compensation for a mature orange or rubber tree, which could earn its owner much more than this over the course of its productive life-span.

The company have failed to make the argument to the government that to adhere with industry international standards and RSPO processes, the government needed to adopt improved standards of procedure and compensation to those specified in national law, which is the very point of voluntary standards such as the RSPO. Clearly it would be in the company's and the government's best interests to agree a framework that facilitates compliance with these norms, since RSPO accreditation is crucial to the companies market access, and is therefore good for business. If the government of Liberia facilitates this, then the image it will give is of a country that is correspondingly good for business. Liberia would then be best equipped to gain from the benefits that flow from enjoying more progressive/less exploitative investment practices; avoiding reputational risks of being found to be in breach of international human rights law; and avoiding the risk of further civil conflict.

The government of Liberia

By negotiating the concession contract, the government failed to respect and protect the human rights of the communities in accordance with its international legal obligations, as well as the RSPO commitments of the company such as the duty to observe the right to FPIC. Community rights over the land and resources were disregarded by the government in agreeing the concession contract, as were the communities' procedural rights, including, *inter alia*, their rights to full information about the proposed development, meaningful participation in decisions concerning their customary land and resources, and adequate compensation and benefit-sharing. After the contract was signed, the government took no further action to protect these rights until a heightened state of conflict precipitated a community complaint to the RSPO. According to the Panel of Experts report, the government deferred entirely to the company by refusing to be drawn into problems the company was experiencing associated with the extent

of customary land claims overlapping the concession area.

After the RSPO complaint had been submitted, there was huge and persistent government pressure on communities and Green Advocates to drop their complaint prior to the bilateral meeting, and to stop the bilateral from occurring. This allegedly included direct and veiled threats to a number of individual civil society members involved; visits to communities by an inter-ministerial delegation of nine 4x4 vehicles the day before the bilateral meeting; and formal letters from the government to Sime Darby to stop the meeting. The fact that the meeting went ahead anyway, and that a process was agreed to resolve the issues, demonstrated not only the commitment of senior Sime Darby staff to comply with the voluntary RSPO standards, but also the strong desire of communities to engage the company directly, rather than being subjected to what they experienced as the manipulation and intransigence of the government of Liberia with respect to the application of FPIC over developments of this nature.

Subsequently, however, government pressure led to the bilateral negotiations process breaking down. The government told Sime Darby not to continue the bilateral discussions, and that the government would deal directly with the communities. The planned follow up meeting on the 22nd December did not happen due to government intervention, and subsequently on January 2nd 2012 the President and Ministers came to meet communities to tell them it was their duty to not obstruct Sime Darby; to not be 'misled' by civil society; and that they were duty bound to adhere to any agreements which the government entered into on behalf of the people of Liberia. The President did however listen to the fourteen issues the community presented which they wanted resolved and their lawyer – Green Advocates' Alfred Brownell – explained the situation to the President who replied that the government had not signed up to people having all

their land cleared. The President then set up an inter-ministerial committee headed by the Ministry for Internal Affairs which was mandated to resolve the issues through three sub-committees addressing compensation, water and land respectively. The government insisted that it, rather than Sime Darby, would talk with the communities.

Subsequently a letter (purportedly coming from Sekou Belloe, one of the original signatories of the communities' complaint to the RSPO) withdrawing the communities' complaint against Sime Darby was sent to the RSPO. It is understood that the letter had been a result of pressure on Sekou Belloe from the Ministry of Internal Affairs, and had been sent despite Sekou Belloe no longer being recognised as one of the communities' representatives, precisely because he was seen as acceding to government pressure to drop their demand that their rights be recognised.

Encouragingly, in February 2012, the government apparently decided to change its approach, revising the composition of the Inter-Ministerial Committee and apparently agreeing that it was necessary for the company to adhere to the RSPO standards and procedures.

Reflecting on the disjunction between national law and the government's interpretation of it, as outlined above in terms of the treatment of customary land and government compensation rates, as well as in preventing the company from negotiating directly with communities, it is clear that the prevailing law and its application by the government is contrary to international standards and RSPO standards. Initially, the government failed to mitigate this both in the practices it adopted during the concession contract negotiation, allocation, plantation planning and development, and in managing the land dispute and RSPO complaint. Not only does national law and practice need to be brought in line with these international laws and best practices, but government should also be providing an enabling



■ Sekou Belloe (left), traditional leader and one of the original signatories of the communities' complaint to the RSPO, with local community member / Justin Kenrick

environment for company compliance with those international laws and norms.

How do the communities see the FPIC process or lack of it?

In the communities visited for this study the researchers were shown former agricultural fields. In many cases they had been completely destroyed against the wishes of the villagers and in exchange for inadequate or no compensation. Furthermore, although a number of local people had been employed by the company as temporary casual labourers, few were employed on a permanent basis. This was very different from the 'propaganda' presented by Sime Darby at the outset, most notably in the following ways:

The information they were given was inadequate:

Local people were clear that they had been informed it was the existing rubber plantation and areas far from the towns that were going



■ *Customary land cleared and planted with young oil palm trees without the free, prior and informed consent of the community. As well as land used for food and building materials, to the right of the photograph land has been cleared and planted on a village burial ground, and to the left (outside of frame), a substantial part of a sacred women's forest was also cleared and planted / Tom Lomax*

to be cleared, not their own farmland, forest land and swamp land. They had not been informed that the creeks they relied on for water and fish were going to be blocked, diverted or drained in the process of clearing the land and building roads, a process that made the water undrinkable.

One community leader stated that:

People would have tolerated Sime Darby clearing [the old BF Goodrich/Guthrie] rubber plantations, but not fields, graves and sacred sites.

The time they were given to consider their response was non-existent, they were not given the opportunity to say 'no', and were given inadequate or no compensation:

Many community members told us that they were given a stark choice between agreeing to accept compensation, or receiving

nothing and just watching as their land was completely cleared. Others spoke of receiving no compensation at all for their land and instead watching as people from outside the community were photographed accepting compensation for what was actually their land. People from the company would arrive in large numbers to clear the land and there was no opportunity to say 'no' in view of this obviously coercive approach.

One community member stated that:

They didn't ask permission to take the land. They were only paying money per acre for people who had deeds for their land [ie they did not compensate for loss of undeeded customary land]...Sime Darby said that 'the government has given us the power to do this'. If we had the power to resist we would not let them take the land. We had to pay them bribes to get them to survey the crops [so that any compensation would be reduced by the amount paid as a bribe].

Another community member stated:

They [Sime Darby] said the government had given them the land, so whether you agree or not we will take the land.

Another community member stated that:

They pushed everything in the water, cleared too

close to the river, so sediment gets washed in, they do this to clear people out.

One woman said:

Everything was destroyed. They did not count the crop. They broke the house down. They destroyed everything. They asked me to bribe them to count the crops, but I had no money to bribe them. They took photos of other people from outside, and claimed it was theirs.

Another highlighted that:

Where Sime Darby cleared, it was where we used to farm cassava to get the money to call someone to teach the children but we can't do that anymore so there is no school for the children anymore.

What actions has the government of Liberia taken to facilitate or allow Sime Darby to comply with international laws and best practice standards?

The government signed the concession agreement with Sime Darby which, as outlined above, is in violation of international law, and prevents the company from being able to meet its RSPO commitments. The government subsequently obstructed the bilateral process set up in response to the RSPO complaint lodged by the communities. Government ministers have changed in response to recent elections and public pressure. For example, the Deputy Minister

for Internal Affairs, who had threatened communities with forced resettlement if they did not agree to the plantation, has since been dismissed. Encouragingly, the new Minister of Internal Affairs and the Chairman of the Land Commission, who are now taking lead roles in negotiating with communities, both recognise that the communities have real grievances that need to be resolved.

However, the prevailing government position appears to be to seek some form of compensation that the company can undertake, including returning small areas of land to communities, so that conflict over land is addressed in ways acceptable to the RSPO, while supporting the company to continue its operations. This leaves a question-mark over whether the government will now address the underlying issues: the need to recognise communities' rights to their land and their right to withhold their consent to their land being taken. Furthermore, the government must provide urgent and immediate assistance to those suffering severely reduced life chances as a consequence of the company's

■ *Balah shows what was formerly a running creek used by her and her village for fresh-water and fishing. Due to clearing, draining and in-filling by Sime Darby, the creek now lies stagnant, risking the spread of water-borne diseases. Balah's family farm land has also been lost to Sime Darby's plantation without their free, prior and informed consent, and she now has to walk many hours to find land on which to grow food / Tom Lomax*



activities, including water-borne diseases from creeks that now lie stagnant, hunger from loss of fields and livelihoods, loss of cultural and sacred sites, loss of income and corresponding difficulties accessing education and health-care. These impacts are clearly inconsistent with the governments' international law obligations to achieve the progressive realisation of protected social, economic and cultural rights such as the rights to food, housing, education, health and culture.

More recently (March 2012) it was reported that the Environmental Protection Agency is calling for new hearings in support of additional permit requests by Sime Darby for new planting areas, before the company has implemented the approved mitigation plans to restore the environment and address the damages caused in Grand Cape Mount County.

In practice, how do Liberia's laws or policies assist or create obstacles for protecting the right to FPIC?

Sections 4 and 5 provide a full analysis of national and international law as regards land acquisition and the rights of customary communities over land and resources. In summary, although some progress has been made in reforms relating to forests, a lack of reform of land laws and the agriculture sector in particular, leaves customary communities vulnerable to 'land grab' in violation of the international laws and best practice highlighted in Section 5. In its requirement for maximum feasible participation by Liberian citizens in the management of the national economy and natural resources, the Constitution provides a national law foundation for advancing the right to FPIC. This is complemented by environmental protection laws, which provide a degree of procedural protection to communities in terms of information provision and consultation.

However, as outlined above State laws and policies and their implementation create

obstacles for FPIC, as well as other cross-cutting rights relating to land and resources. This is primarily because the government appears to see FPIC as encroaching on government sovereignty, on their right to establish concession contracts and speak for their people. A further problem is that undeeded customary land is treated as a state asset to be used as it sees fit. As noted above, the President initially made it very clear to the company that it should not negotiate directly with the communities to resolve the situation, and had made it clear to communities that they had no right to refuse any company activities which the government had authorised.

However the new Minister of Internal Affairs, Blamoh Nelson, said he recognises that the government will have to work hard to regain the trust of Liberians in general, as well as communities in this particular context:

Previously the government has not worked in a way that encourages good governance. The government is encouraging an aggressive civil society. 'Government says this, communities say that' creates a dichotomy. . . . We fought a civil war so that people would be respected.

In reference to any agreements communities may have entered into with Sime Darby, he added: 'These are sovereign people who are signing a sovereign agreement.' There is therefore hope that the government is moving away from poor governance practices, and will work towards shaping a new governance and rural development paradigm based on a fundamental respect for community rights over customary lands and resources.

In practice what are the main obstacles for local communities to securing their lands and exercising their right to FPIC?

The principal obstacles for securing community land rights their right to FPIC stem from problems in the existing land law coupled with poor practices of government

and investor companies such as Sime Darby in concession allocation, management and oversight. As a result, there is a failure to implement and ensure compliance with international law and best practice. Customary communities are not recognised as having the right to FPIC because they are not seen as owning their land. The government perception exemplified by the Sime Darby case is that all land that is not deeded is state land. This perception does not recognise pre-existing customary rights over that land and resources and the right to FPIC. The government therefore believes it has the right to dispense with these undeeded lands and resources as they wish. Sime Darby has acted in a way that accepts this status quo.

The government has leased customary communities' farm-land to Sime Darby for as little as \$1.25 USD per hectare per year. The government's compensation system used by the company means that farmers receive compensation far below a fair estimate of the productive value of the land, for example compensation of \$6 USD is received for each of their orange, rubber or avocado trees that are cut down, and \$80 USD per hectare of cassava. Clearly neither the government nor the company appreciates the value of that land to the communities who have used it for generations.. Instead of going above and beyond the current national law and governance practices to the extent necessary to meet its RSPO commitments such as observing the right to FPIC – which is the very purpose of voluntary certification systems such as the RSPO – Sime Darby has instead proceeded on the same basis as the government.

Recommendations

Resolving the conflict at Grand Cape Mount could, if managed well, be an opportunity to generate good practices and lessons that could be applied to positive effect throughout Liberia, and thereby find a way forward that meets both the objectives of communities keen to secure their land



■ *Amita described having had everything she needed for feeding her family from her village in the forest. The village including the houses was broken down and lost to the plantation without compensation. Now, she and her family rely on her daughter providing food bought in Monrovia / Tom Lomax*

rights and rights to FPIC, the development and human rights commitments of the government as well as the commercial and reputational objectives of private investors.

As a starting point, there appear to be different views on the way forward within the company and within the government. Sime Darby Liberia appeared to accept the government's earlier expressed position of rejecting what it sees as international interference in the form of the RSPO grievance process (despite the fact that it accepts international interference in the form of Sime Darby's activities in Liberia) which requires the company to negotiate with communities and respect their right to FPIC. On the other hand, internationally, senior staff at Sime Darby in Malaysia recognise the importance of the RSPO standards and of adhering to FPIC, and key individuals in government (for example, Dr Brandy, the Chairman of the

Land Commission, and Blamoh Nelson, the Minister of Internal Affairs) recognise the need to listen to and negotiate with the communities.

Communities see an urgent review by an independent assessment of the FPIC process as critical to ensuring that their right to FPIC is observed; that their rights to their land are recognised; and to ensure that compensation is made and that land is returned wherever requested. Senior international staff in Sime Darby see this as critical to their commitment to adhere to international norms and the RSPO principles and to retaining market share by maintaining their RSPO membership. Sime Darby Liberia also needs to understand that this is a critical next step.

On the other hand, the government position to date has been that it is they, not the company, that should negotiate with communities. The government sees this as potentially involving making some compensation but it is as yet unclear whether they will recognise the right to FPIC, since currently their view appears to be that such companies should seek consent from government not from communities. The company (or at least Sime Darby Liberia) has acceded to this view to date, and given way to the government's insistence that it should settle the disputes. The government needs to recognise that FPIC is crucial, and in so doing, respect customary rights as being proprietary rights of equal legal standing to private land ownership. The government must recognise that local communities have customary rights to their land, that they have the right to refuse developments on their land, and have the right – should they agree to developments on their land – to compensation and benefit-sharing that reflects the real losses they suffer when land, crops, trees, wet-lands and water courses are taken from them or otherwise interfered with.

The key to facilitating secure land rights and FPIC is to ensure that all parties adhere to and allow the bilateral negotiations

between the company and the communities to resume and to resolve the issues that have been identified. If the government were to seek to facilitate a process of negotiation between the company and communities based on FPIC, then the situation could be resolved to the benefit of all parties in the following ways:

Communities could receive their land back (or a portion of their land, if they consent to development proceeding) plus compensation and/or restoration for the severe damage that has taken place to date in accordance with community wishes.

The company could retain its hard won (and easily lost) reputation for being environmentally and socially aware and so retain its RSPO accreditation and its market share. It is also clear that other communities where Sime Darby hope to expand their operations have seen the damage they have caused and the lack of FPIC in the land acquisition process, and are considering refusing the company's activities if they seek to proceed without having first resolved the fundamental issues in Grand Cape Mount.

The government would avoid generating the potentially very serious security situation which is likely to worsen if people experience their livelihoods being taken from them and become – in the words of one local person – 'squatters on our own lands'. The government would also avoid the risk of losing those international investors concerned to help create an environment that is secure over the long term, and instead encourage those who are simply seeking to take what they can, in exchange for as little as they can. This would be to the benefit of the international reputation of the government of Liberia in terms of human rights, good governance and stability, as well as being better aligned with key development priorities such as improving food security.

Finally, the government and company need to support the appointment of an independent assessor to undertake

an immediate assessment of the land acquisition and FPIC process and to provide the impartial facts on the basis of which the communities and company can negotiate to rectify the situation. Sime Darby needs to ensure that the damage resulting from the activities they have already undertaken in Grand Cape Mount are speedily resolved before they seek to continue operations in that area or proceed to work in other areas.

Conclusion

Liberia is a country rich in natural resources, yet rural communities have yet to be the primary beneficiaries of this wealth. The issue of human rights is closely intertwined with the issues of natural resource extraction, environmental degradation, and land ownership. For years, profits from ‘conflict timber’ and ‘blood diamonds’ have been used to consolidate elite power and fund brutal armed conflicts. Though Liberia is currently at peace and has conducted two democratic elections, the extraction of natural resources remains a source of human rights abuses with the potential to reignite serious conflict.

Communities in resource-rich areas have been and are being displaced from their lands – sometimes violently – to make way for oil palm and rubber tapping, while timber and mining operations continue to destroy the natural resources on which rural people depend for their livelihoods. In the process, resource extraction operations very often pollute the rivers and watersheds on which communities depend for their survival. Currently, there is no extensive national environment-monitoring plan for Liberia. Furthermore, as noted in the final 2010 UN Panel of Experts report, the Panel state that the Ministry of Agriculture should have an important role in monitoring company activities relating to agricultural concessions, however the Ministry itself reported to the Panel that they did not have the capacity.¹⁰⁸ As such, any check on government and capital investment projects has to be carried out by communities and civil society.

Liberia’s 2008 Poverty Reduction Strategy identifies mismanagement of natural resources, inequitable growth and land-related tensions as some of the key factors in causing and perpetuating Liberia’s civil conflict. By providing livelihoods for the majority of the Liberian people, agriculture is recognised by the Strategy as the ‘bedrock of the economy’ and is identified as having a key role in ensuring poverty reduction, food security and progress towards Liberia’s Millennium Development Goals. Echoing the UN Security Council Panel of Experts recognition of the lack of reform in the agriculture sector, despite exhibiting similar governance weaknesses to other natural resource sectors, the Strategy also claims that ‘[t]he secretive, special deals of the past that benefitted a few to the detriment of the majority will be replaced by transparent agreements with fairer terms and stronger mechanisms to ensure the proper distribution and spending of funds...’. Unfortunately the findings of this case study and the ongoing land-conflict at Grand Cape Mount created by the Sime Darby concession indicate that these governance weaknesses have yet to be properly addressed, both in terms of the mind-set and practises of institutions and the laws and policies concerning how decision-making takes place in respect of large-scale concession agriculture.

Prompted by the community conflict and the formal complaint to the RSPO submitted by the affected communities, negotiations with communities currently involving Sime Darby and the government are a positive sign. From the perspectives of communities at Grand Cape Mount it is imperative that both the company and the government respect the full range of relevant cross-cutting human rights of communities, including their property rights to customary lands and resources. Good faith negotiations must proceed on this premise for there to be a lasting solution that protects the human rights of the local communities, and yield concrete, timely and visible results. The same approach is going to be necessary for the government to

meet its sustainable development ambitions – including via legislative reform of land and resource sectors – in a way that maintains compliance with its international law commitments, and for Sime Darby to maintain their RSPO membership and be seen to meet their corporate responsibility to respect and protect human rights.

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Endnotes

1. This field-work included meetings with as many of the stakeholders as possible. This included the communities themselves, their legal representatives Green Advocates, Government Ministry representatives, the Land Commission, other civil society groups, and Sime Darby in Liberia. A first draft of this case study was provided at a workshop held in March 2012 in Douala, Cameroon, during which representatives from Liberian civil society, the Land Commission and Sime Darby were invited to give feedback on the initial draft.
2. International Tropical Timber Organisation 2005; Verschuren 1983.
3. See for example the UN Security Council Panel of Experts on Liberia 2010, UN doc. S/2010/609; Global Witness 2002, Global Witness 2006. See also the analysis in the Liberia's Poverty Reduction Strategy Paper, Section 2.1 (July 2008).
4. UN Commission on Human Rights 2003. UN doc. E/CN.4/2004/5.
5. The other ethnic groups in Liberia are the following: Bassa, Belle, Dahn (Gio), Dei, Gbandi, Gola, Grebo, Kissi, Kpelle, Krahn, Krao (Kru), Lorma, Mandingo, Mahn (Mano) and Mende.
6. The stigma attached to the Mandingo community is an issue of controversy in Liberia. Although there is no scope here for a full discussion of this issue in any detail, Mandingo's are frequently seen as 'foreigners' in Liberia, as they are an ethnicity living throughout the region, often working as migrant traders, with populations also living in Guinea, Senegal, Mali, The Gambia, Niger and Nigeria.
7. Formalised here refers to the land being held in the form of any of the following individual or collective land titles: Land Deed in fee simple;

- Warranty Deed; Aborigines Land Deed; a Public Land Sale Deed; or Leasehold.
8. In fact, the legal position of customary lands is less clear-cut. The 1949 *Hinterlands Law*, provided for property rights to tribal lands, irrespective of whether they had an official deed, with the tribes interest held on trust by the chief as trustee. (*Revised Laws and Regulations of the Hinterland* 1949, Article 66) The *Aborigines Law*, reproduced much of the wording of the *Hinterlands Law*, but crucially replaced 'right and title', with rights to use and possession, with an option to having this land delimited. (Chapter 11, Title 1 of the *Liberian Code of Law*, 1956-1958) The legal effect of this change of wording is significant: tribal land becomes state-owned, unless formalised by way of a deed. However, there is confusion about whether the *Aborigines Law* has lapsed and/or whether the *Hinterlands Law* retains some legal force in a reissued form. The precise legal status of customary rights to land therefore remains unclear. See Alden Wily 2007 for further details.
 9. Alden Wily 2007: note 8; *Public Lands Law*, Title 34, *Liberian Code of Laws Revised*.
 10. Chapter 8 of the *Property Law (Registered Land Law 1974)*. Also provides the legal framework *inter alia* for land registration and adverse possession, Sub-section 8.53.
 11. *Ibid*, sub-section 8.52(d).
 12. See Alden Wily 2007:135 for details of this procedure.
 13. See Alden Wily 2007:138-139 for more details.
 14. *Community Rights Law of 2009 with Respect to Forest Lands*, section 2.2(c).
 15. *Ibid*, section 2.2.(g).
 16. See for example the analysis of the UN Security Council Panel of Experts on Liberia 2010 Final Report, *supra*, at note 3.
 17. *Public Lands Law*, *supra* at note 9, section 70.
 18. *Ibid*.
 19. *Constitution of the Republic of Liberia* 1986, article 5(b).
 20. *Ibid*, article 65.
 21. *Ibid*, article 7 (author's emphasis).
 22. *Ibid*, article 11.
 23. *Ibid*, article 22(a).
 24. *Ibid*, article 24.
 25. *Environmental Protection Agency Act 2002 (EPAA)*, section 32(1).
 26. *Environmental Protection Act 2002 (EPA)*, section 12.
 27. EPAA, section 6.
 28. EPA, section 4.
 29. EPAA, section 37; EPL, section 6 and annex I.
 30. EPA, section 7.
 31. *Ibid*.
 32. *Ibid*: section 7.
 33. *Ibid*: section 8.
 34. This rarely happens in practice.
 35. *Ibid*: section 11.
 36. *Ibid*: sections 14 and 15.
 37. *Ibid*: section 16.
 38. *Ibid*: section 18.
 39. *Ibid*: section 20.
 40. *Ibid*: sections 22 and 23.
 41. Article 2 of the *Constitution of Liberia* highlights the supremacy of the Constitution over all other sources of law, including international law. International laws (convention, treaty etc.), negotiate, signed and ratified or acceded to by the president or his agent, must therefore be separately approved by an act of the legislature (the Senate and the House of Representatives), ie made part of domestic law, for them to become enforceable in national courts.
 42. See *inter alia* the decision the African Commission on Human Peoples Rights in the case of the *Endorois Welfare Council v Kenya* (276/2003) – the 'Endorois Case' – at para 209, in particular with regard to the ACHPR rights to property (Art. 14) and to development (Art. 22). See also the UN Declaration on the Rights of Indigenous Peoples, Article 19 (indigenous peoples' right to be consulted through their own representative institutions and to obtain FPIC before taking administrative measures affecting them), plus associated Articles 8, 10, 19, 28 and 32; and as well as other jurisprudence established by the UN treaty bodies associated with the ICESCR, ICCPR and ICERD. NB. For customary groups who are neither tribal nor indigenous peoples, nothing in the wording of Art. 14 ACHPR precludes reliance on this right to secure their collective property rights over customary lands and resources.
 43. This requirement is based on the interrelated human rights relating to land and natural resources protected by international law, including the rights to property, development and food. See for example the Special Rapporteur on Food, de Schutter 2009:12 and 2010:319.
 44. See for example the Endorois Case (paras 227 and 228). See also the Convention on Biological Diversity, Articles 8(j) and 10(c), including *The Akwé: Kon Guidelines* on impact assessments at www.cbd.int/doc/publications/akwe-brochure-en.pdf and the Recommendations from *CBD Decision VI/10 of COP 6* for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Furthermore, such a procedural step is necessary to ensure respect for the interrelated human rights relevant to impacts on customary land and natural resources such as the right to property (Art. 14 of the African Convention on Human & Peoples Rights – 'ACHPR'), as well as the right to development (Art. 22 ACHPR) and the provisions of the UNDRD.

45. See the Endorois Case, paras 227 & 228, 294-298 and the UN Declaration on the Right to Development Article 1 (right of peoples to enjoyment of development), Art. 2 & 8 (right to active, free and meaningful participation in distribution of the benefits resulting from development). See also the UN Declaration on the Rights of Indigenous Peoples, including among others, Art. 10 which includes the requirement for FPIC and '*just and fair compensation and, where possible, with the option of return*' in cases of forcible relocation from their lands or territories.
46. RSPO 2007 in particular Criteria 2.2, 2.3, 7.5 and 7.6 and associated Guidance Document. See http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf
47. *RSPO Principles & Criteria*, in particular Criterion 7.1 as well as criteria 7.5 and 7.6, plus associated Guidance and Indicators at pages 37-39 of the Guidance Document on the RSPO Principles and Criteria for Sustainable Palm Oil Production.
48. *RSPO Principles & Criteria*, Criterion 7.3, plus pages 40 & 41 of the 2006 Guidance Document.
49. *RSPO Principles & Criteria*, in particular Criterion 7.6.
50. Final report of the UN Panel of Experts on Liberia submitted pursuant to paragraph 6(f) of Security Council resolution 1961, 7th December 2011 (UN Doc. S/2011/757) & Final report of the Panel of Experts on Liberia submitted pursuant to paragraph 9 of Security Council resolution 1903, 17th December 2010 (UN Doc. S/2010/609).
51. See Panel of Experts 2010 *supra* at note 46, para 130, where the Panel notes the dispute and protest precipitated by expanding existing concessions, as well as Panel of Experts 2011 *supra* at note 46, para 222, for details of the problematic history relating to the Guthrie/BF Goodrich plantation itself which now forms part of the wider Sime Darby concession.
52. Panel of Experts 2011:251, plus see also 172 to 174.
53. Panel of Experts 2010: paras 99 and 100; Panel of Experts 2011: para 215. Concerns are raised by the panel in respect of both the Sime Darby and Golden Veroleum palm concessions.
54. Panel of Experts 2011.
55. Ibid: para 215.
56. Ibid: para 216.
57. Ibid.
58. Panel of Experts 2010: para 119.
59. Panel of Experts 2011: para 216.
60. Panel of Experts 2010: para 129.
61. Panel of Experts 2011: paras 224 & 71.
62. Panel of Experts 2010: para 126.
63. Panel of Experts 2011: para 217.
64. Panel of Experts 2010: para 59.
65. The Universal Periodic Review (UPR) is an international peer-review process convened by the UN HRC whereby the human rights performance of every state is reviewed every four years, principally by a troika of selected peer states. The process is designed to periodically help states think through progress in human rights, and ways in which this could be improved through institutional or policy reform etc.
66. CRC Committee Concluding Observations, 36th Session, 1st July 2004 (CRC/C/15/Add.236), para 23 & 24.
67. CEDAW Committee Concluding Observations, 44th session, 7th August 2009 (CEDAW /C/LBR/CO/6), para 34. See also paras 32/33 and 36/37 regarding education and health of rural women respectively.
68. Ibid: para 39: 'The Committee urges the State party to pay special attention to the needs of rural women and ensure that they participate in decision-making processes, including community decision-making processes and development planning'.
69. CERD Committee concerns and recommendations from the report of its Fifty-ninth session, 30th July – 17th August 2001 (A/56/18), para 434-436; OHCHR, Technical Assistance and Capacity Building, Report of the Office of the United Nations High Commissioner for Human Rights on the progress made in the situation of human rights in Liberia and activities undertaken in the country, 27th August 2009 (A/HRC/12/42), para 4; Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 14th February 2008 (A/HRC/7/67), para 7; and as observed in the OHCHR compilation of reports on Liberia, 20th August 2010, paras 20, 21, 41, 47.
70. Report of the Working Group on the Universal Periodic Review (UPR), 4th January 2011, para 32: Liberia stating that 'In all cases in which alleged land disputes had led to social unrest, Liberia was encouraging social dialogue to resolve issues; was conducting widespread public awareness campaigns on land rights; and was addressing broader, unresolved underlying factors, such as authority and legitimacy, that had fuelled land and property disputes'.
71. Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 6th February 2006 (E/CN.4/2006/114); para 23
72. Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 15th August 2008 (A/HRC/9/15), para 3. Endorsed by Human Rights Council Resolution 9/16.
73. Available at www.fao.org/SPFS/pdf/CFSNS_report_final.pdf.
74. Abaka 2008, *supra* at note 42, para 47.
75. Report of the independent expert on technical

- cooperation and advisory services in Liberia, Charlotte Abaka, 15th August 2008 (A/HRC/9/15), para 38. Endorsed by Human Rights Council Resolution 9/16.
76. Abaka 2008, *supra* at note 49; Abaka 2008, *supra*, paras 28-32; Abaka 2006, *supra* at note 45, para 28, and 29: 'The major human rights concern in the plantation is the blurred line between State and corporate responsibility and the consequent reluctance of either side to take the initiative to protect human rights'; OHCHR Summary of stakeholder submissions to the first UPR, 15th July 2010, para 41; Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 28th February 2007 (A/HRC/4/6), para 2, 19 and 20.
 77. Abaka 2008, *supra*, paras 28-32.
 78. Ibid.
 79. CERD Committee 2001, *supra* at note 42, para 433; CRC 2004, *supra* at note 39, paras 9 & 10; Abaka 2008, *supra*, at para. 75; Abaka 2008, *supra*, para 55(g); UPR Working Group 2011 *supra* at note 44, (recommendations 77.4, 77.10, 78.10); a number of observations are included in OHCHR (August 2010) *supra* (see paras 4 and 21 – including reference to the 'archaic and discriminatory' Aborigines Law and the revised Hinterland Rules and Regulations, and other conflicting laws) as drafted for the 1st UPR of Liberia held on 1st November 2010 under the aegis of the UN Human Rights Committee. Liberia's national report to the UPR stated that 'Liberia is currently engaged in researching and compiling all regional and international human rights instruments to which the country is a party with a view of revising the country's statutory laws to better comply with regional and international obligations' (para 33).
 80. Abaka 2007 *supra*, para 47.
 81. For ease of reference, unless stated otherwise, Sime Darby in this study refers to both the company registered in Malaysia and its Liberian subsidiary.
 82. Gelder & Spaargaren 2010:2, and citing Sime Darby's Annual Report from October 2009.
 83. Ibid:2 & 3.
 84. Ibid:3, citing Sime Darby's Annual Report dated October 2009.
 85. 'Amended and Restated Concession Agreement between the Republic of Liberia and Sime Darby Plantations (Liberia) Incorporated', 30th April 2009.
 86. Land allocated in Yabbasi, Department of Nkam, Littoral Region, MINADER (nd):3.
 87. Gelder & Spaargaren, *supra* at note 56:6, citing Thomson One Database 'Share ownership' as at August 2010.
 88. Ibid.
 89. Ibid.
 90. 'Amended and Restated Concession Agreement between the Republic of Liberia and Sime Darby Plantations (Liberia) Incorporated', 30th April 2009, p. 1 & 2.
 91. This is stated as being 'a global standard of expected conduct for all business enterprises wherever they operate' that 'exists independently of States' abilities and/or willingness to fulfil their own human rights obligations' – see Foundational Principles on page 13 of the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and human Rights: Implementing the United Nation's 'Protect, Respect and Remedy' Framework'. See also See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, 'Protect, Respect and Remedy: a Framework for Business and Human Rights'.
 92. Section 4.1(c) sets out the process of identifying and mapping concession land.
 93. Forced eviction/involuntary resettlement is deemed unlawful under international law except in the most exceptional circumstances. See UN Committee on Economic, Social and Cultural Rights, General Comment 4, *The right to adequate housing* (Sixth session, 1991), para. 18, UN. Doc. E/1992/23, annex III at 114 (1991); Commission on Human Rights resolution 1993/77, UN Doc. E/C.4/RES/1993/77 (1993); Commission on Human Rights Resolution 2004/28, UN Doc. E/C.4/RES/2004/28 (2004); Committee on Economic, Social and Cultural Rights, General Comment 7, *Forced evictions, and the right to adequate housing* (Sixteenth session, 1997), para. 14, UN. Doc. E/1998/22, annex IV at 113 (1998); and See also paragraph 200 of the African Commission on Human Peoples Rights decision in the *Endorois Welfare Council v Kenya* (276/2003) – the 'Endorois Case'.
 94. Sime Darby ESIA for 10,000 ha at Grand Cape Mount and Bomi Counties, prepared for Sime Darby by Greencoms Inc., February 2010.
 95. Ibid, summarised at Sections 1.4.7 and 1.4.8, with further details at pages 56-57.
 96. Ibid: 12.
 97. Ibid: 121.
 98. Ibid: 13.
 99. Ibid: 29.
 100. Ibid: 72.
 101. Ibid: 100-103.
 102. Ibid: 106.
 103. EPA permit number: EPA/EC/ESIA/001-0410, issued on 21st April 2011 and valid until 20th April 2012.
 104. Sime Darby reported to the authors that this fine

was subsequently reduced from \$50,000 USD to \$10,000 USD, and was mainly in response to failures by the company to submit monthly progress reports on the mitigation action plan on time. The authors were unable to confirm this information independently.

105. The 'out-growers' scheme is a plan to provide 40,000 ha of land planted with palm oil for small-holders to own. The details of the scheme have yet to be developed.

106. Ibid:29.

107. Sime Darby ESIA 2010 *supra* at note 90. The table is at the penultimate page of the report.

108. Panel of Experts 2010: para 108.

13 Summary case study on the situation of Golden Veroleum Liberia's oil palm concession

Justin Kenrick and Tom Lomax

GVL/GAR's oil palm concession in Liberia and complaint by local communities to the RSPO

The Golden Veroleum Liberia (GVL) concession agreement was concluded on 16th August 2010 and provides a lease for 220,000 ha of land to GVL in Liberia's southern counties: Sinoe, Grand Kru, Maryland, River Cess and River Gee.¹ In addition, the concession agreement provides for a further 40,000 ha out-grower scheme and a new port with 100 ha of adjacent land. The term of the agreement is for a period of 65 years, with an optional extension of 33 years conditional on GVL having satisfied required certain key performance indicators.²

Plantation development first commenced in December 2010 with two nursery sites, and clearing is understood to have accelerated around September 2011.³ As of the time of writing, it is understood that around 2,500 ha of land has been developed (cleared and planted) in the Butaw District of Sinoe County. Further plantation development (of several hundred hectares) is understood to have recently commenced near the GVL nursery site in Kpayan District of Sinoe county. A further nursery site has been developed in Grand Kru, but plantation development has yet to commence. However GVL has recently posted a New Plantings Procedure Announcement for a further 28,171 ha.

Community grievances concerning the loss of land to the company, the destruction of crops and water sources, the lack of respect for communities' right to free, prior and informed consent in land acquisition and associated allegations of intimidation, arrests and harassment directed at

community leaders, led to a complaint submitted to the RSPO on 1st October 2012.⁴ This complaint also asserted a lack of compliance by GVL with the information and notification procedures required under the RSPO's New Plantings Procedure (NPP). Finding merit in the complaint and reasonable doubt on the issue of FPIC compliance, RSPO requested a freeze in plantation development, pending resolution of the complaint in December 2012.⁵

The Tropical Forest Trust (TFT) was subsequently contracted by GVL to complete an independent assessment of GVL's operations with reference to FPIC compliance. In its final report, TFT's report largely confirmed community concerns about GVL's operations, finding that the plantation had acquired land and damaged community grave sites, creeks and drinking water sources, swamps and food sources, including crop lands, without the community's free, prior and informed consent.

The report found a lack of compliance with key aspects of FPIC (a process which was largely undocumented by GVL) and included the following: inadequate participative consultation with communities; lack of participatory mapping; the taking of land and destruction of community resources without their prior consent; insufficient provision of information to communities; a lack of sufficient time given for the community to consider proposals on their own and in their own way; poor environmental and social impact assessment (ESIA) and High Conservation Value (HCV) Assessment, including a shortage of consultation in ESIA development and lack of accessibility of the ESIA to communities

and; inadequate crop compensation process, with insufficient compensation rates that were not individually negotiated.

TFT's assessment also highlighted the fear of recrimination against farmers if they spoke out about the plantation development, in the light of alleged arrests and detentions by the police. It noted that on two occasions a formal complaint was made to the police by GVL itself. It was also noted that community members who had become GVL employees were reluctant to speak out for fear of losing their jobs.

TFT recommendations included *inter alia*: addressing complaints about drinking water and grave sites; capacity support for GVL's social and other teams; reviewing past land acquisition and finding an agreement on the way forward based on the requirement to respect FPIC and to recognise communities as legitimate owners of customary lands and resources; revisiting existing social agreements; and, reviewing crop compensation and standard operating procedures (SOPs) regarding FPIC.

The TFT report was subsequently used as the basis for the RSPO complaints panel's determination for how the complaint would be dealt with, which included a 6-month deadline for agreeing a roadmap for resolving the complaint (as of the date of the panel's letter of 4th February 2013). Among other recommendations, the complaints panel asked (4th February) GVL to ensure that *all* future plantation development complied with the NPP. Similarly, in its subsequent 5th April letter, the RSPO complaints panel stated that only *past* clearance and development would be considered as 'ongoing development'. Thus legal counsel for the communities understood that GVL would have to comply with procedures under the NPP in all *future* development (treated as 'new plantings' and therefore requiring the 30 day notice period), not as ongoing or continued plantings. However GVL has cleared and planted land both after the 4th February 2013 and the 5th April 2013 letters, but it

has treated all such clearing and planting as being ongoing plantings, and have therefore not given the communities 30 days' notice before those plantings commenced.

It was also expected that GVL would have to redo the SEIAs and HCVAs for existing areas to achieve compliance with RSPO standards, since the originals were found to be so inadequate in key respects – e.g. not recognising important farm land areas etc. (as established by the TFT assessment). To date, it is unclear if this has been done or not, but communities clearly state that they have not been involved; have not been adequately consulted, and; nor have they been given copies of such documents, whereas the documents disclosed on the RSPO website (purportedly placed there in order to comply with the RSPO notification requirements) are instead the original, inadequate SEIAs and HCVAs.

Clearly the underlying purpose of the RSPO's SEIA and HCVA requirements is to *accurately* identify adverse impacts on communities and high conservation areas and mechanisms for avoiding or mitigating those (based on communities' informed participation as a *central* component of the FPIC process); with public notification and a 30-day notice period needed so that those accurate findings are on record, and thereby subject to scrutiny and challenge. A similar public policy basis also underlies the environmental impact assessment procedures and requirements of Liberia's national environmental protection laws. Clearly, GVL's actions to date undermine the very purpose of such procedures in the RSPO standards, Liberia's environment laws and related international law.

The complaint originally concerned GVL, but was later extended to include Golden Agri-Resources Ltd (GAR), as they were understood to be the majority shareholder (or equivalent) in GVL and are also RSPO members. The RSPO complaints panel were also asked to adjudicate on the issue of the alleged illegality of GVL's concession contract; since legality is a key component

of the RSPO Principles & Criteria (Criterion 2.1). Although agreed to by the government and ratified by the Liberian legislature, GVL's concession contract itself *and* the contracting process leading up to and including the conclusion of the contract have been subject to criticism on grounds that they violate national law (including the constitution), as well as Liberia's international human rights law commitments.⁶

This is a fast moving situation and this case study can only capture the background situation (as outlined above) and how things stand at this particular moment (as outlined below) following the expiry of the 6 month period in August 2013. Below we consider what progress has been made (if any) in GVL's practice with respect to FPIC.

GVL/GAR, communities and FPIC: the situation 6 months on

FPP's overall assessment of the situation in relation to GVL/GAR as of August 2013 is that GVL/GAR is not yet able to comply with the principles of FPIC and is not able to respect the communities' customary rights in land. There is still a lack of explicit acknowledgment by the company that communities *own* their land.

Communities remain inadequately informed (including in relation to basic details such as the terms of the concession agreement). Communities are also unclear of the substantive and procedural rights that they hold (necessary for reasonably informing their engagement in processes such as participatory mapping, and high conservation and impact assessment processes). They crucially lack access to independent and other technical legal advice for guiding their engagement with the company, especially in relation to negotiating social agreements. Coercion and intimidation is preventing the possibility of a genuinely 'free' community decision making process, with undue pressure being exerted on communities by local government, company employees and others.

The solution

GVL/GAR needs to recognise that communities *own* their land and act based upon this fact. This would enable communities to make *equitable* agreements with the company, with rents and benefits that are proportionate to the true productive value of the land, and in a way that confirms communities' ongoing ownership beyond all doubt (e.g. via a rent being paid to communities by the company). Without this - although it may offer some possible social benefits without clarity or timelines - the process takes away people's security grounded in their ownership and use of their land, and leaves GVL's concession subject to legal and financial insecurity.

Securing livelihoods and investments in Liberia

The situation in question is not just a matter of abiding by the RSPO criteria and international human rights laws. It is also a matter of ensuring that Liberia remains a place where companies can invest and people can work, secure in the knowledge that their own work and that of the company is improving rather than undermining the country's stability. A major underlying structural cause of the last civil war was rampant food insecurity from high food prices. Clearly, if agreements between communities and companies are seen and experienced as fair and therefore as establishing the basis for secure livelihoods, then those conditions are being effectively avoided. If FPIC processes are undertaken in ways that secure real consent through open and transparent processes, then the security of livelihoods and investments is being assured.

While GVL/GAR is updating the RSPO on its progress in complying with the RSPO criteria, they have also exerted immense pressure on communities, partly resulting from the laying off of 512 workers in Butaw, which in turn has led to huge pressure from those workers on the RSPO

complainants to withdraw the complaint. Complainants describe how they agree to write such a withdrawal, but only under duress (including fears for their personal safety) and only on the understanding that the signed paper would be seen first by their legal counsel (Alfred Brownell of Green Advocates) for his advice on whether or not to submit it to the RSPO. Instead it was sent directly to the RSPO without the benefit of legal advice.

Building on this ‘success’ of the complainants apparently caving in, one of the deputy land commissioners was then involved in giving the community representatives a deadline to agree to a very one-sided MoU. Despite this huge pressure, community complainants wrote a letter rejecting the MoU and negating the purported withdrawal of the RSPO complaint. (The one complainant not doing so had taken a job as Public Relations Officer with GVL as part of the process that had led to the withdrawing of the complaint in the first place). The coerced withdrawal from the complaint in itself testifies to the fact that FPIC is not happening in a way that is free from pressure and intimidation.

The community complainants, while under huge personal pressure, reject the assumption that the land is now the company’s and will revert to the government, and *not* the communities, when the 65 (plus 33) year lease is over (subject of course to further extensions). They are hoping that commercial and other pressures will enable negotiations based on the company accepting an agreement that: enshrines communities’ ongoing ownership of their lands (rather than just promises of the possibility of some vaguely defined social benefits at some point in the future) and; an agreement that does not just give jobs to some while taking land from all, but instead meaningfully recognises customary ownership of the land (whether through an appropriate level of rent to communities or another process) and seeks to move forward through seeking consensus and partnership with communities, rather than through

processes that engender division and endanger the company’s own investment.

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Forest Peoples Programme (nd) *Letter of complaint to Round Table on Sustainable Palm Oil (RSPO) from indigenous Butaw Kru tribes and inhabitants from several local communities within the proposed Golden Veroleum 220,000 ha oil palm concession in Liberia, October 2012.* All sources pertaining to the complaint to the RSPO available from <http://www.forestpeoples.org/topics/palm-oil-rspo/news/2012/10/letter-complaint-round-table-sustainable-palm-oil-rspo-indigenous>

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Tropical Forest Trust 2013 *Independent assessment of free, prior & informed consent process – Golden Veroleum (Liberia) Inc.* February 2013. Final report. Available at http://www.forestpeoples.org/sites/fpp/files/news/2012/10/TFT_GVL_Liberia_FPIC_Report_Final_Eng_low%20res.pdf

Endnotes

1. As per 16th August 2010 concession agreement between the government of Liberia and Golden Veroleum (Liberia) Inc., contract recital and Articles 3 and 4.
2. For a human rights-based analysis of the agricultural concession agreements between Sime Darby and Golden Veroleum and the Government of Liberia, see Lomax 2012.
3. See Tropical Forest Trust 2013:47.
4. See [http://www.forestpeoples.org/sites/fpp/files/news/2012/10/Final%20complaint%20to%20%20RSPO%20on%20Golden%20Veroleum-%20Butaw-sinoe%20county%20\(2\).pdf](http://www.forestpeoples.org/sites/fpp/files/news/2012/10/Final%20complaint%20to%20%20RSPO%20on%20Golden%20Veroleum-%20Butaw-sinoe%20county%20(2).pdf). All documents pertaining to the complaint available at <http://www.forestpeoples.org/topics/palm-oil-rspo/news/2012/10/letter-complaint-round-table-sustainable-palm-oil-rspo-indigenous>
5. See http://www.forestpeoples.org/sites/fpp/files/news/2012/10/RSPOLetter_GVL_PremFindings_December2012.pdf
6. See Lomax 2012; Final reports of the UN Security Council Panel of Experts on Liberia, in particular the final reports for 2010, 2011 and 2012; LEITI 2013. The recent (May 2013) report by Moore Stephens LLP (LEITI's 'Post Award Process Audit' final report) found nine separate regulatory violations concerning Golden Veroleum's concession contract, and judged the contract as 'non-compliant' with the relevant national laws and regulations of Liberia.

The BioPalm oil palm project: a case study in the Département of Océan, Cameroon

14

Emmanuel Freudenthal, Tom Lomax and Messe Venant

Introduction

An increasing trend in large-scale land acquisitions has been observed globally since about 2007 driven by rising food commodity prices, amongst other factors.¹ This phenomenon has attracted the label of ‘land-grab’ due to widespread concern over the threats it presents to the human rights of communities living from the land being acquired. Africa has arguably been the region most affected by such land deals² and the authors of this study have recently witnessed this trend in Cameroon. Coinciding with the moratorium on palm oil in Indonesia in 2011, at least four new large-scale oil palm plantation projects have been announced in Cameroon³ and several existing oil palm and rubber plantations are seeking to expand their current land allocations.⁴ This paper examines an oil palm plantation project planned by BioPalm/SIVA in the Océan department of Cameroon.⁵ It assesses the plans and processes undertaken by the project proponents, reports on the views of local communities and analyses the project’s compliance with national and international laws, with particular emphasis on the right to Free, Prior and Informed Consent (FPIC).

Overall, the authors argue that to date the actions of the company and the government related to this project fall short of the requirements of both national and international law and the RSPO Principles & Criteria and that to avoid conflict and the legal consequences of a serious violation of the rights of citizens, the government and the company will have to make a fundamental change to their approach.

The BioPalm project is planned in southern Cameroon where the Congo basin meets the Atlantic Ocean. The Congo basin is second in size only to the Amazon and hosts a wide range of species including gorillas and elephants. It is also home to a great diversity of ethnic groups, most of whom depend on the forest for their food security and livelihoods.⁶ The current President has been in place since 1982 and was re-elected in October 2011 with close to 80% of the recorded vote.⁷ The driving idea of the President’s latest election programme was to achieve ‘great realisations’, aiming to develop large projects (e.g. dams, mines and other infrastructure) and ‘modernise’ agriculture from subsistence to ‘second generation’ agriculture. Such agricultural modernisation refers to increasing mechanisation using more agrochemicals as well as attracting larger-scale agricultural projects by national and international investors. This effort had been initiated by the 2009 Strategy Document for Growth and Employment (DSCE) that outlines steps for Cameroon to become an emerging country by 2035.

The Vice Prime Minister of Cameroon’s Ministry of Agriculture and Rural Development (MINADER) launched the BioPalm plantation project in August 2011, announcing an investment of 900 billion CFA (1.3 billion Euros).⁸ In the same year, the government reportedly committed itself to provide 200,000 ha to SIVA Group (of which BioPalm is a subsidiary) in a Memorandum of Understanding (MoU).⁹ BioPalm started its work in Cameroon with the Cameroon Investment Corporation, which advertises assistance to foreign investors.¹⁰ In addition to its obligation to adhere to the legal framework of

Cameroon, BioPalm also claims that it is 'setting up its operation in adherence with stringent sustainability policies for palm oil production as defined by the Roundtable on Sustainable Palm Oil principals and criteria standards'.¹¹

Under RSPO rules, member compliance with the RSPO Principles & Criteria is only transferred to subsidiary companies who are not themselves RSPO members if the member company has a whole or majority stake in the non-member. The institutional setup of the companies involved in the project is multi-layered and somewhat opaque so for simplicity we refer to it as the 'BioPalm project'. According to the information available online,¹² the SIVA Group, based in Singapore, 'owns' BioPalm Energy Ltd, which itself, according to the BioPalm representative in Cameroon, operates in Cameroon through a subsidiary called Palm Resources Cameroon Limited. Neither Biopalm Energy Ltd., Palm Resources Cameroon Ltd nor the SIVA group are RSPO members themselves. There is a RSPO member company called 'Geoff Palm Limited', which lists Biopalm Energy Ltd as a company that Geoff Palm either owns, has a stake in or is a joint venture.¹³ In direct telephone communications with a representative of Palm Resources Cameroon Ltd, the representative was unwilling to clarify the relationship of Geoff Palm to Biopalm Energy Ltd, for reasons that were not explained. The authors have also tried to confirm this relationship, and the relationship to SIVA, with SIVA and Geoff Palm representatives themselves. Despite SIVA giving their feedback on the contents of this report in direct communications, neither company have not answered our query as to the full nature of these relationships, and in particular, whether Geoff Palm owns outright, or has a majority stake, in Biopalm Energy Ltd. As a result, we (and more importantly, the communities themselves) are unable to know for certain whether the Biopalm project is obliged to follow the RSPO Principles & Criteria or not in order to retain the certification awarded to Geoff Palm.

This case study is based on FPP and Okani's long-term involvement in Cameroon, desk-based research and seven visits to the area of the BioPalm project between September 2011 and September 2012. During that period, the researchers held numerous meetings with the Bagyéli, Bassa and Bakoko communities of Bella, Moungué, Nkollo and Gwap. They also met with government officials from a number of ministries (MINEP, MINFOF, MINEPAT, MINDCAF)¹⁴ at departmental and national levels and the prefecture. The researchers were not able to meet with MINADER¹⁵ staff despite repeated attempts.

This study examines the the land uses in the department of Océan and around the BioPalm project and discusses some of the impacts the project may have on local communities. It then assesses the nature and extent to which communities have been consulted and whether their right to FPIC has been respected. Finally, the authors report how local communities currently view the project. The actions and omissions of the project promoter and the government in the light of relevant national and international laws and best practice standards are evaluated throughout the paper.

Conflicts of the planned BioPalm plantation with other land uses

The Océan department has recently become the location for a number of large infrastructure projects that will entail the displacement of rural communities. These include a deep sea port,¹⁶ a railway from a large iron ore mine to this port¹⁷ and a gas plant with a transmission line.¹⁸ This new infrastructure comes in addition to existing land uses, which include the Chad-Cameroon pipeline,¹⁹ the Campo Ma'an national park, seven logging concessions, at least six mining exploration permits and a number of forest reserves. There seems to be limited oversight in the coordination of these land allocations. For instance it has recently emerged that the mining

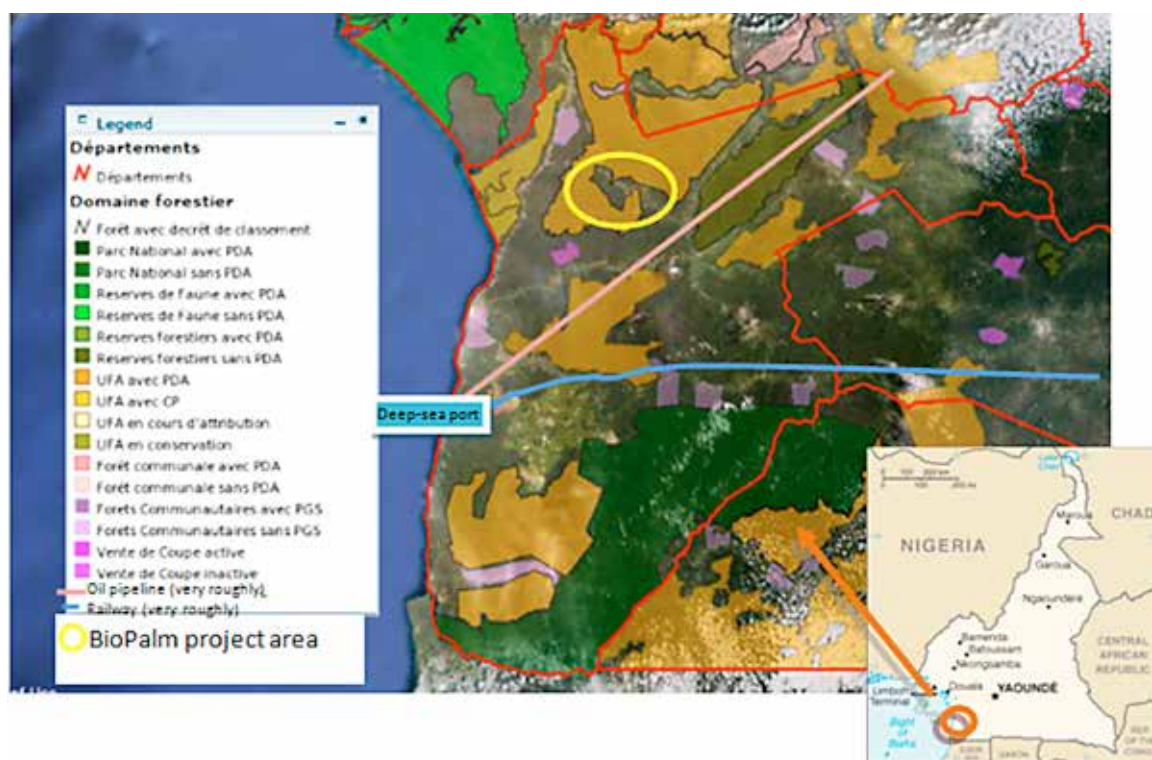
exploration concessions allocated by the government overlap with other concessions and even overlap with each other.²⁰ The authors also noted during their fieldwork that there was limited information exchange and coordination horizontally between some ministries and vertically within the same ministry at the national and departmental levels. The existing land use model leaves only narrow strips of land on either side of roads for farming by communities, while their access to the forest for hunting and gathering products depends on the rules and management practices of each concession. New projects entering this landscape of large-scale land users are therefore likely to bring heightened pressure on the land used by communities for farming and other forms of livelihoods.

Neither Biopalm nor the Government would confirm the exact location that BioPalm plans to occupy despite repeated questions about this from the authors and local communities. BioPalm stated in writing that as of November 2012, the government has not yet allocated land to them. Nevertheless, based on the information gathered and outlined below, it appears that the initial

phase of the BioPalm project targets an area used by four villages: Bella, Nkollo, Gwap and Moungué (see map below). The houses belonging to inhabitants of these four villages are spread fairly evenly along the length of the road from Elog-Batindi to Bipindi and some are on side roads. There are also hunting and gathering settlements within the forest surrounding the villages. Behind the houses, there are fields beyond which the land is predominantly forested for hundreds of kilometres to the south and east (see below).

There are three main ethnic groups living in the area: the Bagyéli, the Bassa and the Bakoko. The main activity of the Bassa and Bakoko is farming, while the Bagyéli are primarily hunter-gatherers but all practise a range of livelihoods. All three groups derive meat, fish, medicines and a number of other natural products from the forest around their villages. The Bassa and Bakoko often present the forest as a reserve for potential fields that the young

■ Some of the land uses in Océan department (adapted from base map WRI Atlas²¹) / Emmanuel Freudenthal



generations will cultivate in the future. There are defined limits between the villages, which are relevant when someone wants to clear a field or build a permanent structure, however the trails leaving from each village criss-cross the land as they extend into the forest. The Bagyéli say that the forest belongs to them as a community and they often set up settlements there, living there for several months and up to a year at a time to hunt, gather forest products and practise other livelihood and cultural activities.

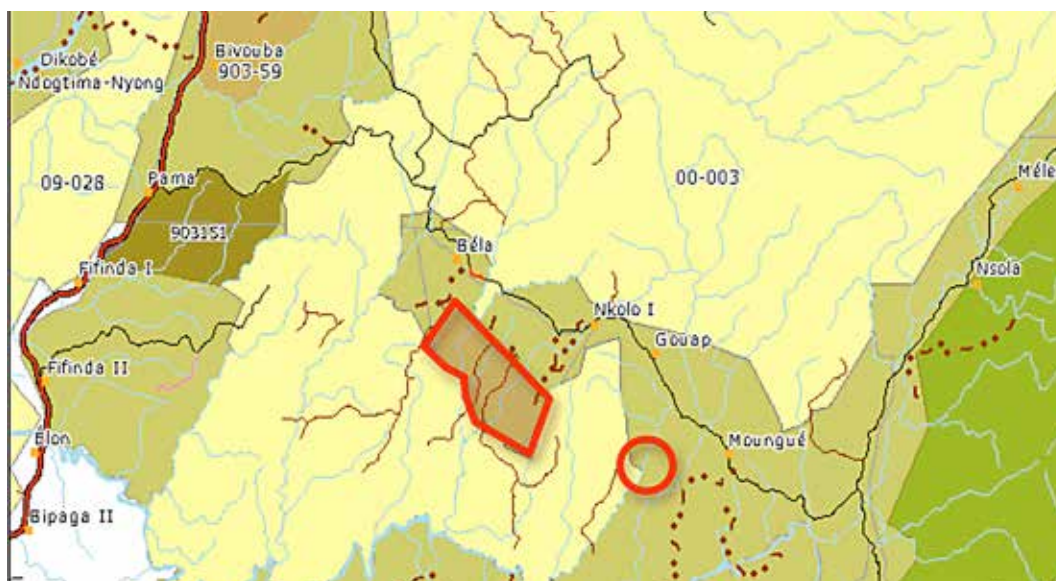
Based on interviews with members of the local communities, BioPalm and government representatives, the authors received several different figures for the amount of land BioPalm is planning to use in the area. MINADER has disclosed that 3,300 ha of the 200,000 ha mentioned in its MoU with BioPalm have been allocated, although this report is undated and it is unclear whether this allocation has been approved by the President as required by

law.²² Nevertheless, as the findings of this report show it is clear that a palm plantation located in the area in question would overlap with community land use and possibly also with an existing logging concession. The authors were told in September 2012 that a forested area further east (near Fifinda) was being logged with a view to creating another plantation for BioPalm.

The land near the villages where the BioPalm project will go ahead is already a source of tension, and the Bagyéli often find themselves in a weaker position in these local conflicts. The Bagyéli interviewed stated that there are many cases where their fields have been destroyed by the Bassa and Bakoko who see themselves as owning the land adjacent to the village. This puts the Bagyéli in an especially difficult position as they reported that they are not able to ask for protection from the government in such situations. They stated that they rarely in contact with government authorities, except when they attend a meeting between the chiefs and the government and at such events they reported not being allowed to speak. They also occasionally have meetings with the government-recognised village chiefs when the latter want to

■ *Forest in the area of the BioPalm project.*
Photograph taken on the Bella-Moungué road (2011) /
Emmanuel Freudenthal





provide information to them. In Cameroon, village chiefs are tasked with officially representing their village to the government. They are chosen for life and instated by the government. All the official chiefs in the four villages visited by the authors were Bassa or Bakoko and were all living away from the village they represent (e.g. in Douala or Kribi), but had a representative in the village (usually a family member). Because of this dynamic the Bagyéli appear to have very limited ability to influence decisions taken regarding their areas.

Most of the forest surrounding the villages is classified as Forest Management Unit (FMU) number 00_003, which covers about 129,188 ha²³ (see below). This FMU was allocated in 2000 as a logging concession to a company called MMG based in the coastal town of Kribi. The management plan for the concession was created during a pilot project financed by Canada's international development agency, Agence Canadienne de Développement International (ACDI).²⁴ This management plan aims to lessen the impact of logging on the forest, for example by demarcating areas where logging cannot take place and using low-impact logging methods.²⁵ It is also reported that the management plan was developed with the participation of the communities.²⁶ Nevertheless, the communities reported that since the attribution of the concession to MMG they have received very few benefits

■ *Rough estimation of the area of planned BioPalm plantation (adapted from base map WRI Atlas²⁸) / Emmanuel Freudenthal*

from the concession owner and have not received any funds from the Redevance Forestière Annuelle (Annual Forestry Tax), a tax on logging of which 10% should go directly towards community projects.²⁷

In addition, the land use plan for the area is a source of tension between the different ministries and companies concerned. The land initially requested by BioPalm and/or MINADER reportedly overlapped with the MMG logging concession. One government official told the authors that the concession owner had been told to 'take his wood quickly' because his concession was part of the land identified for BioPalm that 'needs a lot of space'.²⁹ However the concessionaire MMG has expressed his opposition to giving up all or part of his concession and has appealed in writing to the government.³⁰ Furthermore, while MINADER has been forging ahead with the BioPalm project, it seems that MINFOR, the ministry in charge of forests, was not informed of the project by MINADER or the Prime Minister's Office until the plans were well advanced. Subsequently, MINFOR has expressed concerns about the plantation being established in the FMU because national laws state that this would necessitate the

de-classification of the FMU as state forest and the gazetting of another area of the same category, size and ecological zone. This is understood to be difficult or impossible in the region.³¹

Moreover, the declassification of a FMU cannot take place when clearing is likely to:

- a. harm the satisfaction of the needs for the local populations in forest products;
- b. compromise the survival of the local communities whose lifestyle is related to the forest concerned and;
- c. compromise the ecological equilibrium.³²

These risks would have to be properly assessed through the Environmental Impact Assessment (EIA) process. As outlined above, local communities exercise customary rights to harvest forest, animal and fish products in the area.³³ The declassification of the FMU and allocation of the land to BioPalm clearly threatens these rights and the survival of the local communities who depend on the forest products to meet their everyday food, livelihood, spiritual and cultural needs.

According to a map obtained by the authors (see below), it appears that the plantation is currently planned only on the land outside the logging concession, possibly as a result of the current standoff between ministries and companies, although this is difficult to confirm due to the lack of public and consistent information. This would consist of the land which was deliberately left by the management plan of the logging company for the *communities to use for their farms and houses*, based on a study of their needs, in addition to access to the forest in the concession. Depending on interview sources, BioPalm has promised to leave two to four kilometres of land for the communities on each side of the road for their farming activities.³⁴ The Bassa and Bakoko interviewed were particularly worried that this area would not be sufficient for their farms if village populations increased or if the youth living in towns came back to their villages when they finished their studies.

Moreover, much of the land customarily used by the local communities is forested, both in the logging concession and in the area left to communities along the road (map above). The Bassa, Bakoko and Bagyéli communities explain very clearly the many uses they have for this forest and, as such, the MMG management plan acknowledges the importance of the forest livelihoods for communities and allows them some usage rights in the concession.³⁵ While some forest livelihoods can be undertaken in a forest under commercial logging, areas where oil palm trees are planted will necessitate cutting down most if not all of the existing trees. In these planted areas it will be impossible for communities to engage in their forest-based livelihoods, dramatically affecting the Bagyéli, Bassa and Bakoko. Many Bassa, Bakoko and Bagyéli, asked us, ‘what will the Bagyéli do once the forest is cut?’ Indeed, the forest is the primary source of food, home, livelihoods, spirituality and culture of the Bagyéli, to the extent that their way of life would become impossible if the forest was lost.

In addition, Bagyéli forest use is not visible in the same way that farms and houses are, and as a result it is often difficult or impossible to obtain compensation for the loss of forest lands, associated livelihoods and other impacts. While some compensation for loss of user rights is required by national law, this is not properly implemented in practice. In several other projects nearby, communities in a similar position have never received compensation. These practices and the lack of effective national laws to ensure that land users with little or no visible impact are fully compensated in such cases is clearly discriminatory towards the Bagyéli.

BioPalm’s website specifies that its ‘focus is on planting in areas that had been previously deforested and were with no use, creating new economical and social opportunities for whole communities’.³⁶ As outlined above, the area around Bella and Moungué is neither ‘previously deforested’ nor it is ‘with no use’. The management plan of the MMG logging concession, which is freely

available online, explains that it specifically aims towards the sustainable management of the forest in the concession, clearly implying that the land will be maintained as forest land and not 'deforested'.³⁷ This is also in accordance with the government designation of the land area as part of the permanent forest domain.

Consultation, FPIC and legal compliance in the BioPalm project

Compliance with national laws

According to what the authors were told, the government of Cameroon committed in a Memorandum of Understanding signed by MINADER with BioPalm to identify 200,000 ha of suitable land for the company to develop its oil palm plantation.³⁸ The authors were also told that this MoU has a confidentiality clause and both BioPalm and the government refused to disclose it. It is not clear exactly what MINADER committed to and whether BioPalm could sue the State if it fails to deliver, for example if it is not able to provide the land. Substantial concerns were recently raised about a palm oil project in the Southwest region of Cameroon, including regarding the low quality of the deal negotiated by the government for the State, workers and local communities in a confidential contract signed with the company.³⁹ This approach raises issues of transparency and accountability of the government towards its citizens and civil society. To clarify this and other issues, the authors attempted several times to meet with representatives of MINADER at the departmental and national levels but a meeting was never granted.

Regardless of the terms of the MoU, there is a series of steps required in Cameroonian law for the allocation of concessions such as that requested by BioPalm. Under the land law, national lands that are unoccupied or unexploited shall be allocated by a temporary grant (concession provisoire) of rights for development projects for an extendable period of up to five years.

This grant may become a lease (bail) or an absolute grant (concession définitive).⁴⁰ An applicant for a temporary grant of land must be made to the Lands Service where the property is located. On 'consulting all appropriate parties', in particular the local government, the head of the Lands Service will submit the dossier for consideration by the Consultative Board (commission consultative).⁴¹ Grants under 50 ha shall be allocated by order of the Minister in charge of lands (MINDCAF),⁴² whereas grants of over 50 ha require a presidential order. The latter would be the case for BioPalm and at this moment it is not clear whether the Head of State has already signed the decree granting the temporary lease. In either case, a cahiers des charges (special clauses and conditions) has to specify all applicable rights and obligations.⁴³ Land grants can be terminated under certain conditions including non-fulfilment of the grantee's obligations or insolvency.⁴⁴

The Consultative Board should be appointed by the prefect to reflect a district or a sub-division, and consists of the following members: sub-prefect (chair), representatives from the Lands Service (secretary), the Ministry concerned, and the chief and two leading members (notables) of the village or the community where the land is situated.⁴⁵ During a meeting in February 2012, the MINDCAF Minister told the authors that it was the responsibility of the prefect to ensure that all relevant parties were involved, for example where more than one village is concerned. She also confirmed that where a proposed grant involved an area where both Bantu and Bagyéli communities lived, both groups should be represented on the Consultative Board.⁴⁶

The Consultative Board must meet at least once every three months, members receiving notice and the agenda at least ten days before the date of the meeting, and with the full information displayed on notice boards at specified offices (e.g. situation of the land, area, and project planned).⁴⁷ The Consultative Board is tasked with undertaking the following tasks:⁴⁸

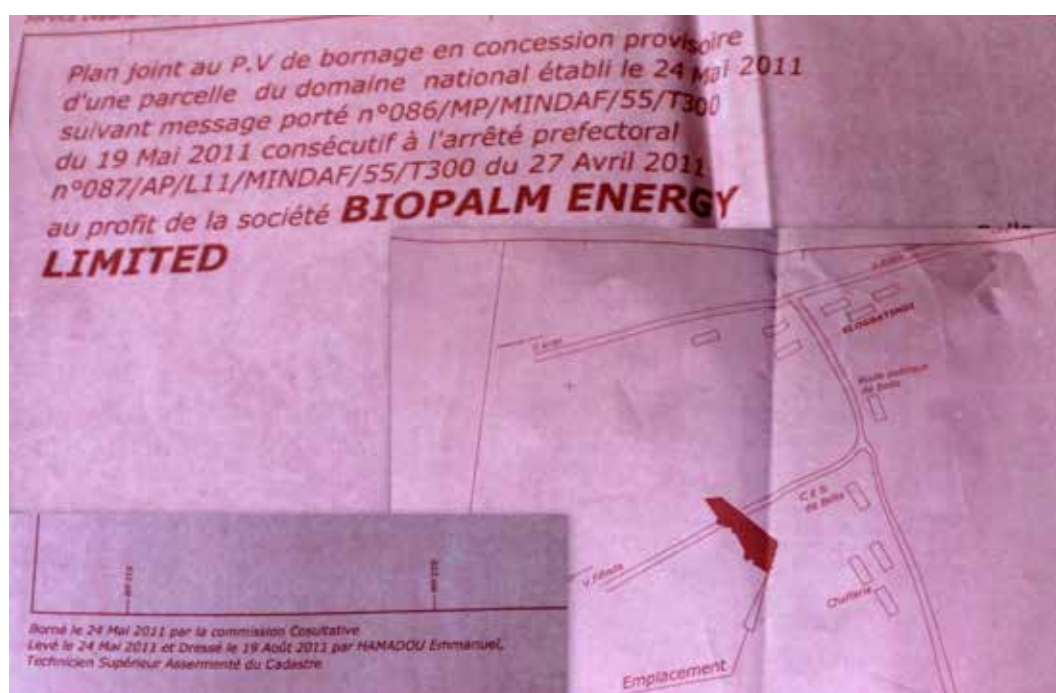
- Make recommendations to the prefectural authority on the allocation of rural areas to agricultural and grazing according to the needs of the inhabitants;
- Make reasoned recommendations (approval/rejection) on applications for grants;
- Examine and, if necessary, settle disputes submitted to it under the procedure for allocation of land certificates on occupied or exploited national lands;
- Select lands which are indispensable for village communities;
- Note all observations and all information concerning the management of national lands and transmit its recommendations to the Minister in charge of the Lands;
- Examine, and if necessary, settle all landed property disputes referred to it by the courts pursuant to Article 5 of Ordinance No. 74-1 of 6th July 1974 and;
- Assess the development (*mise en valeur*) of lands for the issue of land certificate.

A map of the part of the plantation located near Bella (see below) mentions that the limits of the proposed concession have been set by a prefectural order. The map

also indicates that markers were put in place in May 2011 by a 'commission Consultative (sic)' and shows their position near Bella. The chief of three villages and the communities said they had never even heard about such a process taking place. The chief of one village, who supports the project, said that he was involved in a Consultative Board but was not able to give much detail about who was involved and what information was provided to members. If a Consultative Board process did take place, it is clear that its composition did not include representatives of all impacted communities, and was therefore not in accordance with the requirements of national law as interpreted by the MINDCAF minister.

When FPP and Okani first visited the area in September 2011, concrete markers as shown in the photo opposite had just been built to delineate the area of BioPalm's planned plantation.⁴⁹ The land marked on the ground by these markers overlaps the territories of three villages. Since then, more markers have been placed and marking trails have been cut through the forest. According to the communities, the markers were placed without any prior information or consultation with the villagers. They report that people just came into their

■ Extracts of map of markers for the BioPalm concession near Bella (2011) / Emmanuel Freudenthal



forest with GPS devices and installed the markers without any meaningful discussion and without seeking the communities' permission. This is in clear contravention of the Consultative Board process as described above.

If local communities had been meaningfully involved with a Consultative Board, certain obvious mistakes would have been avoided, such as one instance where a marker was placed right behind a house, meaning that the house is entirely included in the concession area. The government has promised the community that this marker will be moved and indeed it does not fit the government's map obtained by the authors (see map above). The researchers were also told that another part of the concession is planned near Moungué village and communities confirmed that the markers had already been placed in the forest but they have not been able to obtain the map for this second part of the concession and neither did the authors.

In addition to the Consultative Board procedures, national law requires that the extent of the risk of harm to community needs and survival presented by the project be assessed by the Environmental Impact Assessment (EIA) procedure and the associated consultation and compensation process. The realisation of EIAs must be done with the participation of populations concerned through consultations and public audiences, in order to collect the opinions of local communities on the project.⁵⁰ The communities also have the right to be consulted on the EIA when it has been drafted, so as to publicise it, to register community opposition and to permit communities to reach a decision on the EIA's conclusions.⁵¹ Community representatives must be given at least thirty days' notice before the date of the first meeting of all the dates and places of consultation meetings; the descriptive and explanatory report of the project; and the objectives of the dialogues.⁵² As many people as possible should be involved.⁵³ Records (*procès-verbal*) of each meeting,



■ Messe Venant (Okani) and a marker behind a house in Bella (2011) / Emmanuel Freudenthal

signed by the promoter and representatives of the communities in attendance, must be annexed to the EIA.⁵⁴ To our knowledge, BioPalm has yet to commence an EIA process as of November 2012. In February 2012, MMG was still finishing the environmental audit process for its logging concession. To comply with national law this process should have been finished before January 2008.⁵⁵

Compliance with international laws

Cameroon's Constitution provides for the primacy of international law over national laws.⁵⁶ This provides a constitutional basis by which international law would supersede inconsistent national laws. To maintain compliance with Cameroon's Constitution, international human rights laws should therefore be used to supplement the requirements of national law detailed above, including the procedures relating to land, consultation and impact assessment, and be used in preference to these national

laws where they fall short of international laws to which Cameroon is a party.

Where BioPalm's proposed plantation excludes communities from areas where they live and/or derive essential food, livelihoods, culture, spirituality and more generally their way of life, this would amount to involuntary displacement/forced eviction with disastrous consequences for the cultural and physical integrity of the communities concerned. Under international law, it is clear that traditional possession and use of customary land by indigenous peoples such as the Bagyéli, amounts to a property right which must be respected and protected by the government.⁵⁷ Interference with this property right could only take place if the right to Free, Prior and Informed Consent of the Bagyéli was respected.

Cameroon endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on 13th September 2007. On 9th August 2008, Cameroon also celebrated its first International Day of Indigenous Peoples. Displacement of the Bagyéli as described above would be in breach of the principles contained in UNDRIP, in particular article 10, which states that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the prior consent, given freely and in an informed manner, by the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 32 of UNDRIP also specifies that indigenous peoples have the right to give or withhold their 'free and informed consent prior to the approval of any project affecting their lands or territories and other resources'.

Cameroon has ratified the International Covenant on Economic, Social and Cultural Rights, which sets forth other binding commitments for Parties, including rights with respect to adequate food, housing,

health and rights to a cultural life, and peoples' rights to self-determination and not being denied their means of subsistence.⁵⁸

With regard to involuntary displacement (also referred to as forced eviction) General Comment No. 4 of the UN Committee on Economic, Social and Cultural Rights (CESCR) states that 'instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law'.⁵⁹ Reiterating this and General Comment No. 7 of the CESCR,⁶⁰ the Special Rapporteur on Food's 'Minimum human rights principles applicable to large-scale land acquisitions or leases' highlights that:

States should ensure, prior to carrying out any evictions or shifts in land use which could result in depriving individuals from access to their productive resources, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to resort to forced evictions.⁶¹

It is well documented that forced relocation can be catastrophic for indigenous peoples as it severs the multiple connections they have with their customary or ancestral lands.⁶² Eviction and resettlement is not construed restrictively as referring to eviction from settlements or houses only, and includes circumstances where the traditional or customary land estate (or parts thereof) are impacted on or lost to third parties. As underlined by the United Nations Sub-Commission on the prevention of discrimination and the protection from minorities, 'where population transfer is the primary cause for an indigenous people's land loss, it constitutes a principal factor in the process of ethnocide'⁶³ and that '[f] or indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications.'⁶⁴

Furthermore, under international human rights law, *all* community members (not just the formally recognised chiefs and notables)

have the right to meaningful participation in decision-making concerning land and resources they have traditionally used and occupied. This includes consultation and the provision of prior, accurate, objective and comprehensive information in a form and language appropriate to all concerned communities, including information on the negative risks as well as the potential benefits of the project. International law requires the completion of a prior and independent cultural, social and environmental impact assessment in such circumstances.⁶⁵ Moreover, communities should receive a reasonable benefit or other suitable compensation for loss of traditional property and other rights in respect of customary land and resources.⁶⁶ In its 2010 Concluding Observations, the Committee on the Elimination of Racial Discrimination *inter alia* noted with concern the impacts on the Bagyéli of the Chad-Cameroon pipeline and recommended that Cameroon

consult the indigenous people concerned and cooperate with them through their own representative institutions, in order to obtain their free and informed consent, before approving any project that affects their lands, territories or other resources.⁶⁷

The right to meaningful participation and consent in decision-making processes concerning developments affecting customary lands can also be argued for other customary communities with connections to their customary lands.⁶⁸ The recent (2012) Resolution 224 of the African Commission on Human and Peoples' Rights on a Human Rights-Based Approach to Natural Resources Governance⁶⁹ calls on state parties including Cameroon to confirm that 'all necessary measures must be taken by the State to ensure participation, including the FPIC of communities, in decision making related to natural resources governance', mindful 'of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights of access and control of various resources, including land, minerals, forestry and fishing'.⁷⁰

In addition to its obligations under national and international law, BioPalm has assured FPP (in writing and in person) that it will operate according to the voluntary RSPO 'Principles & Criteria for Sustainable Palm Oil Production'. As stated above, although BioPalm is not currently listed as a member of the RSPO itself,⁷¹ its website states that BioPalm 'is setting up its operation in adherence with stringent sustainability policies for palm oil production as defined by the Roundtable on Sustainable Palm Oil principals and criteria standards'.⁷² Although SIVA, BioPalm, and Geoff Palm representatives have not clarified the exact links between these companies at our request, they have stated that 'when the holding company is RSPO member all companies held by it becomes members and non compliance by any subsidiary means all subsidiaries are treated as non compliant.' As such they appear to be suggesting that the plantation project in Cameroon can be considered as operating under RSPO certification by virtue of Geoff Palm Limited's RSPO membership, but as mentioned above, we have been unable to confirm this.⁷³

Assuming the RSPO standards do apply to the project, a key requirement of the RSPO is respect for the right of all communities to free, prior and informed consent. FPIC is also a settled principle under international human rights law as outlined above. Despite the clear requirements of national law, the international legal framework and the RSPO Principles & Criteria as set out in this report, BioPalm has been unable to reply to our repeated requests for information as to how the company is planning to respect the principle of Free, Prior and Informed Consent and other obligations.⁷⁴ Indeed, it is difficult to imagine how a process for Free, *Prior* and Informed Consent could take place when the location of the plantation is apparently already decided and delineated. The advanced stage of planning and the existence of concrete markers goes against the spirit of RSPO Criteria 2.2, 2.3 and 7.5 which states (7.5) that 'no new plantings are established on local peoples'

land without their free, prior and informed consent, dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions.⁷⁵ It is crucial that the proposed location of the plantation is subject to the free, prior and informed consent of local communities prior to the formal allocation of land. The advanced state of planning and delineation thus raises questions about Biopalm's commitment to respecting the right to FPIC, especially when compared with their assertion that nothing is yet established in Bella and so it is 'premature' for them to outline how the company will comply with the RSPO Principles and international laws.⁷⁶

Moreover, most of the communities and their representatives were not adequately *informed* about the project. The provision of information is an essential precursor to any meaningful consultation process, so as to enable the communities to begin collective discussions about the merits and risks of the project and ultimately make a decision on whether to grant or withhold their consent. According to all of the many villagers interviewed, they were not provided with even basic information on the proposed location and size of the plantation project. This was also denied to the authors despite repeated requests to the company and government. The information provided to some individuals during the two or three presentation meetings held in the area only presented the advantages of the BioPalm plantation project and there was no mention of the risks and potential disadvantages (such as loss of livelihoods, disruption of water sources etc.). In effect these presentations were an attempt to 'sell' the project to the affected communities, instead of providing full and frank disclosure of both the risks and benefits. The communities were not told about their rights under national law, the international legal framework or the RSPO Principles & Criteria. Furthermore, the promises and limited information given to the communities by the promoters of the project were not given in writing. Neither the

company nor the government has provided the communities with documentation such as proposed concession maps or other relevant documentary materials or provided information in forms/languages appropriate to those who do not speak French or are illiterate.

During the few presentation meetings that did take place, the communities were not asked for their *consent* - or even opinion - on the proposed project. One villager reported that a government official told them during a public meeting, 'I did not come to ask the opinion of the populace. The forest is the forest of the State'.⁷⁷ One village chief requested just half an hour to consult with his community to think through their common position on the project but the government authorities told him that there was no point in doing so because the project would go ahead regardless of their opinion. Furthermore, there are no indications that the company or government are giving the communities the opportunity to decide their own representative decision-making structures, for consultation, participation and structured negotiation. One chief explained that they 'are forced to accept because we have not got the information to have a meaningful discussion'. This clearly shows that the current process does not seek the meaningful participation and consent of communities, in clear violation of constitutionally protected international standards and RSPO standards.

Views of local communities on the BioPalm plantation project

As a result of the lack of clear information and the potential negative impacts of the plantation, which would destroy a substantial part of the forest, all the Bagyéli communities interviewed in the four villages were against the project. One Bagyéli stated, 'the forest is ours, they are going to come and tear it away from us'.⁷⁸ On the researchers' first visit in September 2011, the Bassa and Bakoko communities were torn between on one hand the destruction of the forest, with the negative impacts

this would have on their lives, and on the other hand the promises of jobs and ‘development’, such as in the form of provision of infrastructure by the company, including roads, schools, water pumps and hospitals. Arguably the responsibility of providing such infrastructure lies with the government but so far it has not fulfilled its role in this area. As outlined above, neither the company nor the government have provided balanced information to communities on the potential benefits that could accrue from the palm oil plantation and its potential risks. No information at all was provided in writing.

At the request of the local communities, FPP and Okani agreed to enable them to access more complete information on the potential effects of palm oil projects. In June 2012, a number of community members and two chiefs visited the SocaPalm oil palm plantation located nearby. They had the opportunity to meet with members of the local communities living near to the plantation (in Bidou 1 and SocaPalm Kilombo) and hear about their experience directly from them. The communities living near the plantation reported that they had lost access to their customary lands, lost their forest livelihoods, been arrested for trespassing to pick palm kernels on trees existing prior to the plantation and got very little in return. One Bulu woman said:

We have lost everything. The children no longer know the names of trees, animals and fish. The loss of this area is a disaster for us.⁷⁹

The group then shared what they had learnt with their villages back home. As a result, community members from the Bakoko and the Bassa became very worried that the BioPalm project could in fact affect them very negatively, in addition to the more obvious and direct impacts on the Bagyéli.

After many discussions within and amongst communities, during a meeting involving over eighty Bagyéli, Bakoko and Bassa from all the villages, the chiefs of three villages decided to sign a petition against the project. Two letters were sent, one to the President of the Republic of Cameroon and one to the Governor of the Province in September/October 2012. In their letter, the chiefs clearly stated that they had neither been officially informed, nor consulted and that a palm oil plantation could have negative impacts on their livelihoods, especially those of the Bagyéli. They requested the government to inform them officially of the plans for the plantation and of the ways that they would be consulted and their FPIC would be sought. The Bagyéli communities issued a similar letter outlining how they would lose their hunting grounds, traditional medicine and other things crucial to their life that the forest provides, and their consequent rejection of the oil palm project. The chief of one

■ *Coordination meeting organised by the three chiefs opposing the project in one of the villages near the proposed plantation (with further participants inside the building) (2012) / Emmanuel Freudenthal*



village, who had been dealing directly with the project developer and the State without informing his colleagues or community, continued to support the project despite the opposition of much of his community. Some have alleged that he has a personal stake in the project taking place. During the authors' work, it was observed that this chief was closely linked with the company (e.g. calling company representatives on his cell phone during meetings) and had access to much more information about the project than the other chiefs and community members.

Conclusion

At this stage, it is not known what steps the government has taken or plans to take to ensure that the company respects national and international laws in terms of consultation with communities and respecting their right to Free, Prior and Informed Consent. It is clear that the actions of the company and the government to date fall short of the requirements of both national and international law and the RSPO Principles and Criteria. In several instances, government officials have even told us to ask BioPalm for the official documentation and information (such as concession maps and authorising decrees), thus forgoing their role of enforcing laws and regulations and encouraging best practice and transparency. Meanwhile, the communities are very worried about losing their lands and livelihoods as government officials have told them that there is no recourse against the project taking place. One community leader said in September 2011, 'we accept unwillingly'⁸⁰, but since then communities have become increasingly mobilised so as to demand respect for their rights.

With so much at stake for the Bagyéli, Bassa and Bakoko communities and apparently so little effort to meaningfully engaging with them, there is significant potential for conflict, such as that currently taking place at the Herakles oil palm plantation project in the Southwest province of Cameroon.⁸¹

To avoid the risk of conflict and the legal consequences of a serious violation of the rights of its citizens, the government and the company will have to make a fundamental change in their approach, and closely observe both national and international laws and RSPO standards, including the right to FPIC of communities. Failure to do so is bound to have serious negative legal, commercial and reputational consequences for BioPalm and its parent company as well as repercussions on the government of Cameroon.

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Endnotes

1. Borrás et al 2011: 209–216.
2. Deininger 2011: 217–247.
3. Cameroon News 2011; Butler & Hance 2011; Lukong 2011; Brown (nd).
4. For example, the authors were told that SocaPalm and HeveCam were planning to expand their plantations.
5. An earlier version of this report was presented for feedback by BioPalm and the government of the Republic of Cameroon (MINDCAF and MINEPAT) during a workshop organised by FPP, CED and the FAO in March 2012. A final version was then presented to SIVA/BioPalm by email for comments. The report was drafted in consultation with the local communities of the area.
6. *Mongabay* (nd).
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21. Map based on data from authors' own research; www.cameroun-foret.com; CIA (nd); CAMIRON/Rainbow Environment Consult 2011; Esso (nd).

22. MINADER (nd):3.
23. Data.cameroun-foret.com (nd).
24. Yene Yene 2002; Data.cameroun-foret.com (nd).
25. Data.cameroun-foret.com (nd).
26. Yene Yene 2002.
27. This is unfortunately a common occurrence. See for example Cerutti et alii 2010:130–138.
28. Map based on World Resources Institute 2007.
Note: The location(s) of the plantation were not given to the authors by BioPalm but are based on interviews with communities regarding the location of markers.
29. 'On lui a dis, prends ton bois rapidement car les concessions se chevauchent. Il faut beaucoup d'espace.' This and other translations by Emmanuel Freudenthal.
30. Specifically, to MINFOF, MINDCAF and MINADER.
31. For the procedures on classification see Article 28 of Law No. 94-1 of 20th January 1994 ('the Forest Code'), & Articles 9, 18, 19 and 24 of Decree N° 95/531/PM of 23rd August 1995.
32. Article 9 of Decree N° 95/531/PM of 23rd August 1995.
33. For non-commercial purposes, the user rights of communities to harvest all forest, wildlife and fisheries products are provided for by Section 8 of the 1994 Forest Code.
34. In the map of one part of the concession near Bella, two kilometres are left the side of the main road (with no space along secondary roads).
35. Data.cameroun-foret.com.
36. BioPalm (nd2).
37. If the forest is degraded, then either the concession owner has acted in breach of the management plan, or the government-approved management plan was inadequate.
38. See also Cameroon News 2011.
39. Nguiffo & Schwartz 2012.
40. Decree No. 76-166 of 27th April 1976 to establish the terms and conditions of management of national lands, Articles 1-3.
41. Ibid: Arts. 4-6.
42. Ibid: Art. 7(1).
43. Ibid: Art. 7(2).
44. Ibid: Art. 8.
45. Ibid: Art. 12. It is left unclear in the law whether, if the land relates to more than one village/community, more than one chief plus two notables will be part of the Consultative Board, or if it would be kept to a maximum of one chief and two notables.
46. It is not clear what mechanisms are in place to ensure that this approach is observed in practice. Relying on the prefect's discretion to ensure representation from all affected groups, including indigenous peoples, is clearly an inadequate procedural safeguard and leaves a wide margin for inadequate representation in decision-making process. This is one of several discriminatory aspects of the existing legal framework that would need to be addressed in the planned reform of Cameroon's land tenure laws in order for them to be effective and respect human rights and national aspirations. Discriminatory aspects of Cameroon's land laws with respect to indigenous peoples have been the subject of criticism and recommendations for reform under international human rights law. See for example Concluding Observations and Recommendations of the African Commission on Human and Peoples' Rights: Cameroon, 12th – 26th May 2010, at para 37; the Concluding Observations of the Committee on the Elimination of Racial Discrimination: Cameroon, 30/03/10. UN Doc. CERD/C/CMR/CO/15-18, at para 18, where the Committee urges Cameroon to 'Establish in domestic legislation the right of indigenous peoples to own, use, develop and control their lands, territories and resources'; and the Concluding Observations of the Committee on Economic, Social & Cultural Rights: Cameroon, 23/01/12. UN Doc. E/C.12/CMR/CO/2-3, at para 24.
47. Ibid: Art. 13.
48. Ibid: Art. 14.
49. FPP 2011.
50. Decree n°2005/0577PM of 23rd February 2005, Art. 11(1).
51. Ibid: Art. 9, 11(2) & 13.
52. Ibid: Art. 12(1).
53. Ibid: Art. 12(2).
54. Ibid.
55. The legislation setting out the procedures for impact environmental assessments came into force in 2005 (Decree n°2005/0577PM of 23rd February 2005 & Order 0070/MINEP of 22nd April 2005). Projects already in progress were required to conduct an environmental audit within 36 months of the relevant law being signed (Decree n°2005/0577PM of 23rd February 2005, Art. 21.), but as of March 2012 the requisite audit is yet to be finalised by MMG in respect of FMU 003.
56. Article 45 of Law No. 96-06 of 18th January 1996 states that 'Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement'. The constitutional commitment to international law is also confirmed in the constitution's recital which states that it 'Affirms our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and The African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto'.
57. See *inter alia*, decision of the African Commission on Human Peoples Rights (ACHPR) in the Endorois Case at para 209, in particular with regard to the ACHPR rights

- to property (Art. 14) and to development (Art. 22). See also the UN Declaration on the Rights of Indigenous Peoples, Article 19 (indigenous peoples' right to be consulted through their own representative institutions and to obtain FPIC before taking administrative measures affecting them), plus associated Articles 8, 10, 19, 28 and 32; and as well as numerous other jurisprudence established under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of Racial Discrimination (ICERD).
58. Articles 11, 12 15 and 1 respectively of ICESCR. Article 1 is common to both the ICESCR and the ICCPR to which Cameroon is also a party.
 59. Committee on Economic, Social and Cultural Rights, General Comment 4 para. 18, U.N. Doc. E/1992/23, annex III at 114 (1991), para. 18.
 60. Committee on Economic, Social and Cultural Rights, General Comment 7, para. 14, U.N. Doc. E/1998/22, para. 13.
 61. de Schutter 2009:16.
 62. See for example, IWGIA & FPP 1999, in particular pp. 4 -55.
 63. See Al-Khasawneh & Hatano 1993 at para.101.
 64. Ibid: para. 336.
 65. See the decision of the African Commission on Human Peoples' Rights in the case of the *Endorois Welfare Council v Kenya* (276/2003) – the 'Endorois Case' – paras 227 and 228, and the cross-cutting human rights relating to land and natural resources, such as the right to property (Art. 14 of the African Convention on Human and Peoples' Rights – ACHPR), as well as the right to development (Art. 22 of ACHPR). See also the Convention on Biological Diversity, Articles 8(j) and 10(c), including *The Akwé: Kon Guidelines* on impact assessments at <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf> and the Recommendations from *CBD Decision VI/10 of COP 6* for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.
 66. See African Commission on Human Peoples' Rights in the Endorois Case, paras 227 & 228, 294-298 and the UN Declaration on the Right to Development Article 1 (right of peoples to enjoyment of development), Art. 2 & 8 (right to active, free and meaningful participation in distribution of the benefits resulting from development). See also the UN Declaration on the Rights of Indigenous Peoples, including among others, Art. 10: 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.'
 67. Concluding observations of the Committee on the Elimination of Racial Discrimination: Cameroon, 30/03/10. UN Doc. CERD/C/CMR/CO/15-18, at para 18, recommendation (b). See also the Concluding Observations of the Committee on Economic, Social & Cultural Rights: Cameroon, 23/01/12. UN Doc. E/C.12/CMR/CO/2-3, inter alia para 33: 'The Committee recommends that [Cameroon] take effective measures to protect the right of each group of indigenous people to its ancestral lands and the natural resources found there, and to ensure that national development programmes comply with the principle of participation and the protection of the distinctive cultural identity of each of these group.'
 68. Whereas for indigenous peoples, the right to FPIC is an expression of their right to self-determination, the right to FPIC of non-indigenous peoples can also be argued on the basis of the cross-cutting rights impacting on land outlined including the rights to property, the right to development and the right to food. See also de Schutter 2009 (especially Principle 2, p.13); de Schutter 2010:319.
 69. Resolution on a Human Rights-Based Approach to Natural Resources Governance, ACHPR 2012, <http://www.achpr.org/sessions/51st/resolutions/224/>.
 70. African Commission on Human and Peoples' Rights 2012.
 71. RSPO (nd2).
 72. Ibid.
 73. I.e. Holding Company: Broadcourt Investments Ltd & Premalatha Chandrasekar; [Subsidiaries/ JVs/ has stake in: Sierra Leone Agriculture SA, African Oil Palm Limited, SPZ Enterprise Pty Ltd, Sierra Leone Agriculture Limited, Biopalm Energy Limited, PT Citra Ganda Utama, Liberian Palm Developments Limited, Dekel Oil, Feronia Inc] as listed on <http://www.rsपो. org/en/member/1147>.
 74. FPP 2012.
 75. RSPO 2007.
 76. FPP 2012.
 77. 'Je ne suis pas venu demander l'avis aux populations. La forêt c'est la forêt de l'Etat.'
 78. 'La forêt est la notre, ils vont venir nous l'arracher.'
 79. 'Nous avons tout perdu, les enfants ne connaissent plus les noms des arbres, des animaux et des poissons. La perte de cet espace est une catastrophe pour nous.' Quote collected by Venant Messe.
 80. 'On accepte involontairement'.
 81. Nguiffo & Schwartz 2012.

SG Sustainable Oils Cameroon PLC (SGSOC) in South West Cameroon

15

Christopher Fon Achobang, Samuel Nguiffo and Brendan Schwartz

On 17th September 2009, SG Sustainable Oils Cameroon PLC (SGSOC) signed a contract with the Cameroonian government to develop a large industrial oil palm plantation and refinery. SGSOC is 100% owned by the American company Herakles Farms, an affiliate of Herakles Capital, an Africa-focused private investment firm involved in the telecommunications, energy, infrastructure, mining and agro-industrial sectors.¹

SGSOC claims to have obtained rights to 73,086 hectares of land in the Ndian and Kupe-Manenguba Divisions of Southwest Cameroon through a 99-year land lease. According to their Environmental and Social Impact Assessment (ESIA), SGSOC will develop 60,000 hectares of land for oil palm nurseries, plantations and processing plants.² The remaining 12,000 ha will “be protected as zones for environmentally or socially sensitive resources, plantation infrastructure and social infrastructure, and lands for village livelihood activities.”³ Cameroon’s Institute of Agricultural Research for Development (IRAD) has supplied SGSOC with seeds to begin their palm nurseries. The project will produce as much as 400,000 metric tons (MT) of crude palm oil and 40,000 MT of palm kernel oil per year. SGSOC plans to export a portion of its palm oil production, while leaving some for domestic consumption in Cameroon ‘depending on market conditions.’ By December 2012, SGSOC had planted four palm nurseries and cleared over 60 hectares of forest to this end. The company has reportedly applied for a land lease covering the 73,000 hectares it hopes to exploit.

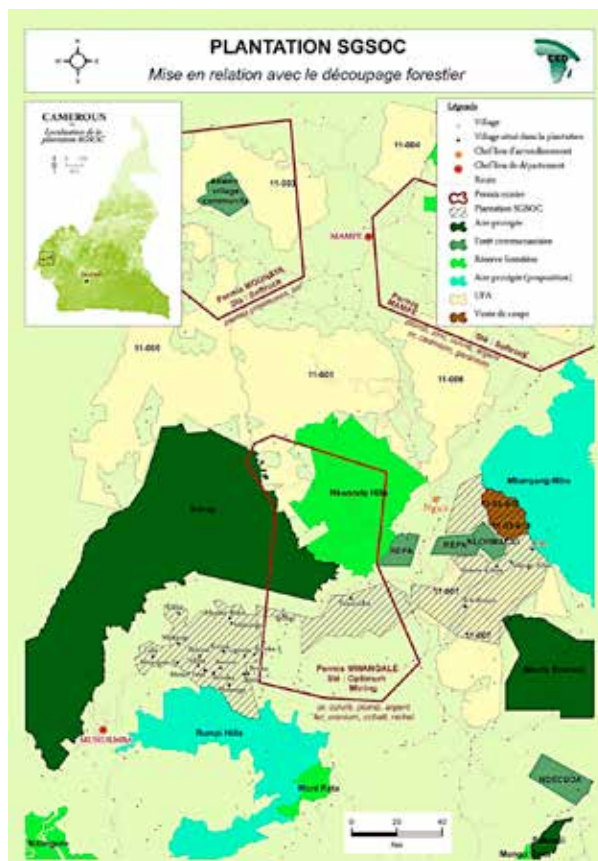
SGSOC’s project has been the subject of great controversy over the last two years.

Local communities, conservation groups, and NGOs have expressed opposition to the project due to its numerous negative social and environmental impacts. However, Herakles claims the project will contribute to socio-economic development and environmental protection. Yet in September 2012, the firm withdrew their application for membership of the RSPO in reaction to a formal complaint lodged against them and widespread criticism of their project.⁴

Oil palm development in Cameroon

Cameroon has a long history of abusive practices by foreign agro-industrial companies occupying large tracts of land, abusing workers, and using chemicals harmful to people and the environment.⁵ The Cameroonian government has made it a high-level political and economic decision to develop agro-industrial plantations to promote job creation, economic growth and development. Today, Cameroon produces approximately 200,000 MT of palm oil per year and exports 35,000 MT onto the international market. Production is dominated by five companies that collectively occupy 60% of the land devoted to oil palm plantations.⁶

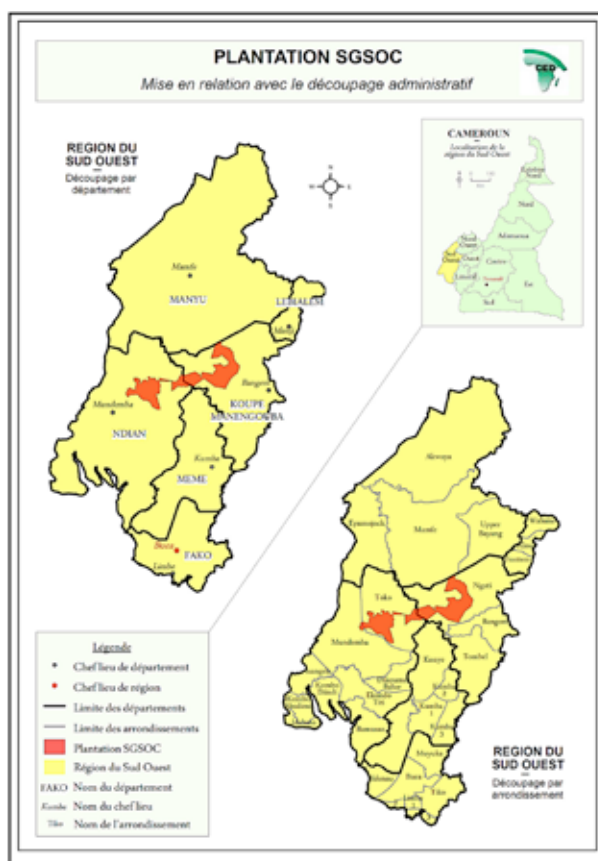
Cameroon hopes to further develop the palm oil sector on an industrial scale principally by attracting foreign investors. Many international palm oil companies are searching for fertile land throughout Africa due to a moratorium on new oil palm plantations in Indonesia and limited land availability in Malaysia: the two countries produce 80% of the world’s palm oil exports. In addition to the SGSOC project,



Cameroon recently ceded a large amount of land near Kribi to Goodhope Asia Holdings Ltd for a palm oil plantation capable of producing 20,000 – 30,000 MT per year.⁷ According to working documents from the Ministry of Economy and Planning and press reports, approximately 2 million hectares of land are currently the subject of negotiations for new agro-industrial plantations in Cameroon.⁸

The area in question

The proposed plantation area is divided into two blocks spanning the Ndian and Kupe-Muanenguba Divisions of South West Cameroon. The Nguti concession is over 42,000 hectares while the Mundemba-Toko concession area is 31,000 hectares in area.⁹



from the area. The Bassosi villages fall under the umbrella of the Mboum Nsuanse, the Bassosi Cultural and Development Association that represents 11 Bassosi villages.

Upper Balung is another clan in Nguti sub-division numbering over 6,000 people, according to Barrister Eni Makia, Chief of Betock village. They occupy the seven villages of Talangaye, Manyemen, Ebanga, Ayong, Betock, Sikam and Baro. These villages are mostly located along the Kumba – Mamfe road and comprised of cocoa farmers.¹⁰

Even though three Upper Balung chiefs (Chief Dr. Atem Ebako, Chief Eben Nkongho Jacob, Chief Lordson Asek Akum) support the project, the majority of their populations are opposed to it. Chief Lordson Asek works with SGSOC as Community Development Officer and his role is to sensitise the Upper Balung people on the merits of accepting the SGSOC plantation. Chief Eni Makia of Betock is completely opposed to project while Chief Eben Nkongho claims that he has 3,147 hectares to offer the company, but worries about how much land will remain for subsistence agriculture.

General perceptions of the proposed plantation in Nguti—

The Bassosi are primarily farmers of cash crops such as cocoa. The area produces over 10,000 tons of cocoa supply each year, according to Chief Ajang Samuel of Ntale. The Bassosi also cultivate oil palm trees and gather non-timber forest products (NTFPs) such as *njangsa*, African bush mango, pepper, bitter cola, and others. The Mboum Nsuanse are united in their opposition to any industrial palm oil project on the Bassosi lands. They claim that the available land is just enough for them and their descendants to use for the next 50 years. In a communication with the authors of this report, Herakles stated “it has respected their [Bassosi] decision not to be partners of the project.”¹¹

Nevertheless, the researchers observed that in several villages, those who are supposed to represent the community are ignoring the wishes of their people. Even though one of the elites and village chief, Chief Dr. Atem Ebako of Talangaye has thrown his weight behind the SGSOC industrial oil palm project, many of his subjects are opposed to it.¹² Ebako has stated that he decides for his village and everybody must abide by his decisions. One of the Chief’s representatives, Eyong Richard, says chief Ebako has instructed villagers of Talangaye to speak to no one about the SGSOC project without his permission. Ebako has also ordered his subjects to avoid contact with environmental organizations such as Greenpeace and WWF.

A similar situation is occurring in Manyemen village where Chief Oben Nkongho supports the project while the vast majority of his subjects oppose it. He claims that after scouting in Europe and America for capital, investors told him that Cameroon was a corrupt country and thus would not invest there. According to Chief Oben, SGSOC has come to fill that investment gap. He underscored that if the communities were paid carbon credits, then he would be satisfied and turn away from SGSOC.¹³ Ayong village also suffers a similar fate under its chief Lordson Asek, who is a Community Development Officer (CDO) for SGSOC and supports the project while a majority of the community is opposed to it.¹⁴

It is interesting to note that in the villages whose local chiefs support the project, the company has tactfully avoided sharing useful information with the supporters of the project. The discourse presented by Herakles Farms posits the plantation is a government project and thus the local communities must comply. However, groups such as UBACUDA, the Upper Balung Cultural and Development Association which represents 7 villages, is mobilising its constituents to oppose the project. Led by Barrister Chief Eni Makia, the Association is looking for means to stage their opposition to the project publicly.

Mundemba – Toko

Mundemba – Toko are sub-divisions in the Ndian Division of the South West Region of Cameroon. Mundemba sub-division is host to the Korup National Park of renowned high conservation value. The Park covers 129,000 hectares and is one of the world's richest bio-diversity hotspots. Toko sub-division is host to the Rumpi Hills. The Rumpi Hills area serves the main catchment and watershed for most of the South West Region in Cameroon and the Cross River State of Nigeria. For example, the Mounjo River, which flows south-eastwards to the Littoral Region and into the Atlantic Ocean, takes its source at the Rumpi as does the Cross River.

These two subdivisions are inhabited by over 21,000 people. Mundemba commands a population of 14,385 according to Okwo Wa Namulongo Peter, Deputy Mayor of Mundemba. The proposed concession area, which already hosts two Herakles Palm nurseries at Fabe and Lipenja I, has a population of 6,500.¹⁵ There are 23 villages in the concession area as follow: Mofoko Bima, Ngenye Bima, Esoki Bima, Mokange Bima, Fabe Bima, Lipenja II Batanga, Meangwe II Ngolo, Ndiba Ngolo, Meta Ngolo, Beboka Bima, Kuma Bima, Lipenja II Batanga, Iwai Bima, Mobenge Ngolo, Bwene Ngolo, Mokango Bima, Massaka Bima, Many Batanga, Mayeke Batanga, Bareka Batanga, Esoki Batanga, Loe Batanga and Ikondo Kondo I.¹⁶

General perceptions of the project in Mundemba-Toko—

The Mundemba-Toko area is inhabited by three ethnic groups: the Bima, Ngolo and Batanga. Many residents in these communities oppose the Herakles plantation since the Cameroonian Government earmarked 129,000 hectares of their land for the Korup National Park and additional land was set aside for the Rumpi Hills Park. The Cameroonian government assured them that the remaining portion would be used for agriculture for current and future generations.¹⁷

According to one of the supporters of SGSOC's agro-industrial project Nangea Felix, the Chief of Fabe, the Prime Minister had reassured local communities that if they needed farmland in the future, the government would cede a portion of the Korup National Park back to communities for agricultural use.¹⁸ There are serious allegations that some elites from the Mundemba – Toko proposed concession area are fuelling a conflict which might soon escalate. An example is the Chief of Fabe who states that people like Nasako Besingi, the director of a local NGO called SEFE which opposes the plantation, should never come to his village as they come and provoke people by informing them of their rights to their forests.

Meetings under the umbrella of the Ngolo Cultural and Development Association, Batanga Cultural and Development Association and Bima Cultural and Development Association, have raised allegations that representatives of SGSOC have been using financial incentives for locals in order to win public support for the project. A report by the South West Delegation of the Ministry of Forestry has also stated, "The team has collected during its fact finding mission in 20 villages a lot of information showing the way SGSOC is operating. The negotiation is done with lot of intimidation and bribery, targeting the chiefs and some few influential decision-making members of the communities."¹⁹

Legal status of the company's rights to the land

A thorough analysis of SGSOC's rights to the land reveals a very confusing legal situation. According to the Establishment Convention of September 2009 signed with the Government of Cameroon, SGSOC's rights are clearly explained and include the following:

- "...The non-exclusive right, franchise, and license for and during the Term to: (i) engage in Production in the Production Area (and subject

to the terms of this Convention, in other areas in Cameroon), (ii) develop, manage, maintain, rehabilitate, and expand (as may be permitted herein) the Production Area, (iii) to utilize Oil Palm Products in Cameroon and to supply to local markets and to export and to export oil palm products from Cameroon, (iv) to produce other agricultural products after providing Notice to Government and (v) to conduct such other activities as contemplated by this Convention, in accordance with applicable Law.²⁰

- The right to benefit from government support to expand the production area.²¹
- The right 'exclusively, within the Production Area, to plant, cut and utilize timber, to the extent the Investor and any Investor Party deems necessary for the construction and maintenance of Infrastructure, without the need to obtain any further authorization or pay any further fees, and for other Investor Activities within the Production Area, subject to Article 10.'²²
- The right 'exclusively, within the Production Area, to take and use, subject to any limitations pursuant to Article 10, free of charge (but not to sell to any other Person without the written approval of Government), such water, earth, stones, rocks, sand, clay and gravel having no significant commercial mineral value other than as aggregate filler or other construction material, as Investor may considered necessary or useful for Investor Activities, without the need to obtain any further authorization or pay any further fees. Any activity conducted pursuant to this Section 3.3(a)(v) shall not be considered mining for purposes of any Law.'²³
- Carbon Credits. Government undertakes to promptly provide to Investor all certificates, consents, authorizations, and other supports reasonably requested by Investor in connection with the application for or monetization of the Credits.²⁴

However, this agreement can only be considered as a framework agreement governing the relationship between the Cameroonian Government and the company, which aims at setting the general rules that will apply when the company receives a land concession. The

Establishment Convention does not grant, in itself, any right to a specific portion of land to SGSOC, despite the reference to an annex supposedly describing the project area, which has remained unpublished so far. It is our understanding that the description of a proposed concession does not absolve the company from the requirement to apply for a land concession, following the procedure set forth by the existing regulations. SGSOC's application for a land concession should therefore be subject to the existing land regulations in Cameroon, providing for a clear process for the allocation of land concessions.

According to Decree N° 76-166 of 27th April 1976 establishing the terms and conditions for management of national land, land concessions are granted following submission of an application which includes, among other files, a map of the land solicited and a project development programme. Rights to the land are granted in two stages: 1) temporary grants for up to five years and 2) with a possibility of extension to a long lease in case of satisfactory implementation of the activities planned for the temporary grant phase. Authorities empowered with the right to allocate land concessions are also specified in the Decree. For concessions of less than 50 hectares, the allocation is granted by a ministerial order of the Minister in charge of Lands, and for concession of over 50 hectares, a Presidential Decree is needed. The purpose of this process is to allow third parties (especially communities, but also the citizens of Cameroon more broadly) to be informed of the allocation, and to eventually challenge the extent or the nature of rights to be granted to the company in question.

The land lease should provide a description of the land granted, including clear limits, both as a way to protect the investor and in order to prevent future conflicts between the grantee and other potential users of the land and resources. In the case of SGSOC's operations, this procedure was not respected. SGSOC does not have a land lease, but has been proceeding with forest

and land clearing, in order to create a palm nursery in its claimed concession.

The Ministry of Forests and Wildlife has provided us with evidence of SGSOC's illegal behaviour, explained below. The former Minister of Forests and Wildlife signed a letter (disclosed in the appendices of the company's High Conservation Value Assessment) to 'Certify that the entire concessions granted to SG SUSTAINABLE OILS CAMEROON LIMITED...have been logged and farmed repeatedly over the years and the area is classified as secondary forest. The concession areas applied for are not virgin or primary forests.'²⁵

This statement by the Minister contradicts the forest zoning plan of 1995, under which part of the proposed oil palm plantation overlaps with the permanent forest estate, where only conservation and sustainable logging (with an approved management plan) are authorised. Furthermore, when the company began clearing the forest, the regional delegate of the Ministry of Forestry and Wildlife seized SGSOC's bulldozers and issued a notice of illegal logging. A field mission of the central control unit of the Ministry of Forestry and Wildlife and a report of the European Union's independent

forest observer confirmed the illegal nature of the tree felling in the area and a fine was levied against the company.²⁶

If indeed SGSOC had obtained valid land rights for the area, the forest management unit would have been declassified and the regional delegation of forests would have no authority to conduct controls in the area. However, this is clearly not the case since the forest management unit in question was included on a list of logging concessions for allocation (to be managed for the next 30 years) in the July 2012 tendering process.

After having claimed, for some time, that they did not need a land lease, citing the Establishment Convention, the company is now actively trying to seek a land concession, in compliance with Cameroon's regulations.

It should be noted that the Establishment Convention is clear on this issue, as section 3.5 states:

Government shall issue, or cause to be issued, all necessary permits, authorizations and land registration certificates required under applicable law for investor to lease and exercise its rights in all of the production area and to provide public notice of such rights of investor.²⁷

This article seems to clearly indicate that the Establishment Convention is insufficient to

■ *Economically valuable logs piled in Talangaye by Herakles Farms in Talangaye plantation / Fon Christopher Achobang*





claim rights to the land and requires the investor to fully comply with Cameroon's regulations on State and National Lands.

■ *Planted area with new bags for nursery at Talangaye plantation near Nguti / Fon Christopher Achobang*

On 9th November 2012, the Minister of Forestry and Wildlife provided SGSOC with an authorisation to fell trees in the permanent forest estate. The Minister's decision is an agreement, in principle, for SGSOC to commence operations on the site they have identified. According to the authorisation, given the urgent need to plant palm trees from the nursery, SGSOC is requested to fell and store the trees themselves. Again, this authorisation does not comply with the existing laws and regulations governing forestry in Cameroon.

■ *Forest shredder and picker at Talangaye nursery / Fon Christopher Achobang*



The right to fell trees cannot be granted to a company for a project which has not been approved by the competent Ministries (the Ministry of Agriculture and Rural Development and the Ministry of Cadastre and Lands in this case). The Ministry of Forestry is sending contradictory messages: on the one hand, it has levied a fine on the company for illegal felling of the trees in the permanent forest estate. Subsequently, however, it has granted the company with the right to continue the very activities the ministry considers illegal.

In the context of the future implementation of the Voluntary Partnership Agreement (VPA) between the EU and Cameroon as part of the *Forest Law Enforcement, Governance and Trade* (FLEGT) process, these conflicting actions of the Ministry of Forestry are likely to raise serious questions about its ability to properly assess the legality of operations in the future. In conclusion, from a legal point of view, the company does not have a valid land title, which is clearly a condition for starting operations, and thus its operations can be considered illegal.

What has the company or the government done to respect Free and Prior Informed Consent (FPIC)?

FPIC is not recognised in Cameroonian legislation. However, the land regulations in Cameroon contain provisions recognising and protecting some community rights, even in the absence of formal property (land title). Article 8.1 of the 1994 Forestry Law gives rights to use the land and resources for the benefit of neighbouring communities. According to this law, these rights can be expropriated for public utility, subject to the payment of compensation.²⁸ One could assume that in the absence of a public utility declaration, the common principles of compensation apply, and any restriction of the right to use land and resources would lead to compensation, either monetary or in kind.

In the case of SGSOC's operations, the Establishment Convention itself constitutes a violation of the usage rights recognised by the Forestry Law for the communities living in or around the proposed palm plantation. A portion of the land concession constitutes National Land, equivalent to the non-permanent forest estate (ie free of any property rights). However, another part has been earmarked to be incorporated into the category of Private State Lands (permanent forest estate). In those two categories of forests, communities enjoy usage rights recognised by the 1994 Forestry Law. Surprisingly, section 4.2 of the Establishment Convention states that 'the Government represents and warrants that all State land in the production area is not encumbered by any [...] use rights [...]'. There thus appears to exist implicit recognition of customary rights to land and resources, especially on National Lands, mainly through the possibility of transferring those rights to third parties, with approval from the local government and authorities. The loss of those customary rights should logically be subjected to the right to information and compensation for the communities, which should require their consent, even in the absence of clear

provisions in the laws and regulation to this effect.

The right to be consulted (and therefore, implicitly, informed) of all activities potentially affecting their area applies in at least three circumstances. First is the gazettment process. The Forestry Law obliges the Government to consult communities living in an area to be converted from National Land to privately owned land (either to the benefit of the State, of municipalities or individuals).²⁹ Second is the preparation and the validation process of the ESIA report. The project sponsor is required to consult potentially affected communities in order to document expected impacts of a project and to design appropriate mitigation measures.³⁰ Third is the granting of land concessions on National Lands, where the process prescribes the involvement of the consultative commission which includes communities' representatives.³¹

Concerning FPIC, the laws and regulations are very weak, since they refer to the terms 'consultation' and 'participation', and never mention 'consent' of the communities. Furthermore, the laws and regulations provide no indication in terms of the process or the result to be achieved by the project sponsors during the consultation process. This loophole in the law is detrimental to communities and prevents the government from being able to objectively monitor compliance with legal requirements in this regard.

In the specific case of SGSOC, the company enjoys support from some local chiefs (far from being the majority of the chiefs in the area) and certain community members, as well as certain local authorities. There has however been a severe shortage of open public discussion on the project, and the government has never stated its official position regarding the proposed investment, including on the validity of the Establishment Convention. If the project is to proceed under the current legal setting, the government's ability to protect the

rights of impacted communities, including their FPIC, will be seriously undermined.³² According to the Establishment Convention, the government of Cameroon is obliged to provide land for oil palm development to SGSOC. Article 23.3 of the Establishment Convention states:

Non-Derogation. Government affirms that at no time shall the rights (and the full value and enjoyment thereof) granted by it under this Convention be derogated from, unreasonably delayed, frustrated, impeded or otherwise undermined by the action or inaction of Government, any official of Cameroon, or any other person whose actions or inactions are subject to the control of Government including any action that rescinds, or purports to rescind, the rights or benefits granted Investor or project participant hereunder.

This leaves very little space for implementation of FPIC as it is conceivable that the result of the FPIC process could contradict Cameroon's contractual obligations.

Furthermore, there is a long running misunderstanding between communities and the government on the issue of property of the land and resources, and decisions concerning its management. The legal design granting property of certain categories of land to the government (public land and private property of the State), and putting the management of national land under the trust of the government, has been an ongoing source of frustration for the communities.

In the proposed SGSOC land concession, communities believe consent should be required before their land is granted to the company, and they feel the government's current position (a silence that allows the company's operations to continue) does not represent the views of the majority. It is worth noting that the land regulations in Cameroon do not provide for a mechanism to arbitrate disagreements between communities and the government on a proposed land management decision.

The most significant obstacle to the recognition and proper implementation of FPIC is the government's policies, which prioritise the following main objectives:

1. Creating an enabling environment for investors, especially in the natural resources sector, in order to attract more foreign direct investment. This objective is often perceived as lifting any restrictions on the operations of the investors. This is reflected in a number of contracts signed between foreign companies and the government, which often contain stabilisation clauses that exclude foreign investors' compliance with existing laws in Cameroon. These clauses are no longer limited to fiscal provisions and are so broad that they can impact on community and human rights. The assumption behind this position is that foreign direct investment will lead to economic growth and that wealth creation will accrue to the communities. According to this view, the adverse impacts of a company's operations will be compensated by the positive development opportunities brought by the presence of a foreign firm in a given area.
2. Reducing unemployment, by facilitating operations requiring intensive use of unskilled labour. Land concessions for agriculture are perceived as a quick way to generate jobs. In the case of SGSOC, the promise to create 7,500 jobs has most likely influenced the government's decision not to cancel SGSOC's contract or halt operations, despite the company's persistent violation of the law.
3. Increasing exports. This objective has been emphasised since the beginning of the structural adjustment programme in the late 1980s and has focused on natural resource exploitation.

In the case of SGSOC, the Establishment Convention is potentially detrimental to human rights as it contains provisions

clearly violating human rights recognised and protected by domestic law and international agreements ratified by Cameroon. In section 9.3, for example, the Establishment Convention provides SGSOC with the power to 'search, apprehend, detain, exclude and evict unauthorized persons from the production area' in contradiction to the Penal Code of Cameroon, the African Charter on Human and Peoples' Rights (which is an integral part of the Cameroonian Constitution) and of the United Nations Covenant on Civil and Political rights.

The Establishment Convention contains provisions related to compensation to be paid by the government to the company in case SGSOC's rights are not respected as recognised by the Convention. Given the fact that most of the rights granted to the company overlook communities' rights, it is anticipated that the government will soon be in the position of having to choose between the protection of the communities' or the investor's rights, with high chances that it will opt for the protection of the latter.

Finally, by entering into the described agreement with SGSOC, the government has failed to comply with its obligations under the International Covenant on Economic, Social and Cultural Rights. The United Nations Special Rapporteur for the Right to Food, Olivier de Schutter, stated in his Cameroon country report:

Article 2, paragraph 1 of the International Covenant on Economic, Social, and Cultural Rights says that each State must progressively implement the right to food "using the maximum of available resources."...However, the weak fiscal imposition on agricultural and logging concessions is striking. For example, SGSOC obtained a land lease for 73,086 ha of land for a duration of 99 years, through an annual royalty (land fee) of \$1 USD per hectare (for developed land) or \$.5 USD per hectare for undeveloped land... The Special Rapporteur encourages Cameroon to reconsider its fiscal policy for agro-industrial and logging concessions to optimize revenues derived from its natural resources.³³

There are many obstacles preventing communities from securing their rights via FPIC. The persistent belief in the existence of 'un-utilised' land in Cameroon, which is the assumption upon which the entire legal land tenure system is built, leads to structural marginalisation of rural communities from their lands. The law allows for a sort of ownership and for individual customary rights on areas utilised by persons, using an evidence-based standard of 'development' or 'enhancement'.³⁴ However, the government and national land laws deny communities' rights on land considered to be part of the commons. To date, Cameroon's land laws were conceived based upon the colonial model which consists of identifying land uses by rural populations and then differentiating between 'used' and 'unused' lands. The State considers communities claims to these 'unused' lands as exaggerated due to the perception that communities do not use or need them.

Another obstacle is the belief that foreign direct investment is inherently virtuous and necessary for economic development. The government acts as though the need to attract foreign direct investment justifies the suppression of any and all potential impediments to foreign direct investment, and FPIC is often perceived as a major obstacle to investment.

In Cameroon, access to information is very difficult for rural communities, which in turn limits the possibilities of implementing an adequate process to seek their consent. It is also interesting to note that the government's stance leads to the dispossession of communities of their land in order to facilitate investment, which further marginalises FPIC as a land management tool. In January 2011, the President of Cameroon, in his opening speech at the Ebolowa National Agro-Pastoral Show, instructed the government to prepare a land-use reform to facilitate access to land for large agro-industrial companies (baptised 'second-generation agriculture'). Since 2012, the Minister in charge of lands has launched a process to create government land banks which will

be taken from National Lands, the very lands where communities enjoy customary use of lands that are not legally protected.³⁵

Finally, the application of voluntary standards is not encouraged by the Cameroonian government. This could be seen as a deliberate decision not to impose standards or restrictions on agro-industrial operations, and second, or a result of ignorance of the existence of such standards and their purpose by relevant government bodies.

Community relations, the RSPO and the SGSOC FPIC process

Herakles Farms, the parent company of SG Sustainable Oils Cameroon marketed its palm oil project to investors, the Cameroonian government and local communities by promising to adhere to the Principles and Criteria of the Roundtable on Sustainable Palm Oil (RSPO). RSPO standards are very complex, as are the legal and procedural implications of FPIC. It is not our intention to provide a thorough explanation of either, but rather to analyse certain aspects of each which created discord between SGSOC, RSPO, local and international NGOs, and the local communities themselves.

RSPO requires that its members or applicants implement a robust FPIC process with local communities, refrain from clearing or pressuring High Conservation Value areas (HCV), comply with all national laws in their countries of operation, and publish a New Planting Procedure informational document at least thirty days prior to planting oil palm or clearing land to make way for planting. SGSOC was unable to implement many of the standards and processes required by the RSPO which eventually led to the company's withdrawal from RSPO and intensified tensions with local communities.³⁶

SGSOC and FPIC

Free, Prior and Informed Consent requires, among other things, that impacted

communities be provided with accurate information concerning a proposed project prior to a project's advanced planning stages, and that communities be permitted to use traditional methods of representation and non-coercive decision-making prior to giving or withholding their consent to a project. Communities have the right to seek legal counsel to negotiate agreements that condition their consent. Agreements must clearly and specifically define the land and compensation rights of local communities and any benefits such as employment, royalties, land excisions and so forth. These agreements should be available to all parties at all times.³⁷

It would be difficult to argue that SGSOC has implemented a robust FPIC process since the company signed a contract which defined the nature of the project and granted it broad rights prior to any serious stakeholder engagement and certainly without local consent. The Convention was signed in 2009 while the company held most of their public sensitisation meetings in 2010-2011 (though some meetings were held prior to the signature of the Convention). Herakles Farms' CEO rebutted this critique by explaining that the company 'signed Memoranda of Understanding (MoUs) with the communities in and around our concession area, as well as Common Commitments with local officials.'³⁸

The authors of this report administered a questionnaire to 69 individuals in 18 villages to be impacted by the project to ascertain this statement.³⁹ While all 69 respondents stated they had been in communication with the company at least once, all but four stated that the company had not made any assessment of their land rights. The four who had witnessed the company assess their land rights all belong to Ekita village, but none feel that SGSOC understands or respects their claims to land rights. 68 of the 69 individuals responded that the company had not conducted participatory mapping in their village, with one person abstaining from comment.⁴⁰

68 of the 69 respondents stated they had not participated in any discussions about ‘mitigation, monitoring, benefit sharing and compensation agreements’ with one person abstaining from comment. All 69 respondents stated there was no agreement between their community and the company as to how their lands would be used and managed.

Although the sample size of the interviews is limited, the evidence overwhelmingly indicates that FPIC has not been respected by SGSOC. It was not possible to verify the exact numbers, but the authors are aware of a small number of communities that have signed MOUs with SGSOC. Yet it appears that these agreements did not pass through representative decision-making channels (as required by FPIC) as many villagers are unaware of their existence. It is unlikely that community members were presented with the opportunity to seek legal counsel when negotiating the existing accords, another fundamental requirement of FPIC.

SGSOC has stated very clearly it does not intend to compensate local communities but will leave 2,000 hectares of land for subsistence agriculture. It is estimated that 25,000 people depend on subsistence agriculture in the area. If 12,000 of these are estimated to be in working age (in line with Cameroon’s general demographic trends), this would mean each individual holds 0.166 ha, a clearly insufficient area of land. This is most likely the reason why there have been no frank discussions on compensation issues in the area between the company and the communities

Local tensions in the project area

Herakles’ poor outreach and communication with local communities has frustrated villagers who feel the plantation will have an adverse impact on their livelihoods. The communication vacuum was filled by a local NGO, based in Mundemba (Ndian Division), called Struggle to Economise Future Environment (SEFE), which began

sensitising locals to the negative social and environmental impacts the project could bring to the area. SEFE also filed a lawsuit in the Mundemba High Court against SGSOC’s ESIA. The judge granted an injunction on the development of the oil palm plantation until the legal issues were resolved.⁴¹ However, SGSOC continued its activities in violation of the court moratorium, which was eventually lifted on 27th April 2012.

New Planting Procedure

SGSOC submitted its application to the RSPO for a new planting on 15th February 2012, which opened a thirty – day comment period to the general public. A total of eight NGOs and researchers submitted comments requesting that RSPO reject SGSOC’s application for the following reasons:

- The company violated Cameroonian law in the ESIA process and refused to respect a court injunction on the project.
- SGSOC’s contract violates Cameroonian and international law.
- Independent HCVF analyses revealed at least 20,000 hectares of HCVF in the concession area.
- Independent analyses found an inadequate amount of land would be left for subsistence farmers who would therefore be forced to take up agriculture in the surrounding forest and protected species areas.
- The proposed planting area is home to rare animals and serves as a migration corridor for numerous species.⁴²

The RSPO forwarded the above complaints to its internal judicial mechanism which asked the complainants to enter into mediation with SGSOC in order to find an amicable solution to the complaints filed. Unfortunately, the parties were not able to amicably solve their differences via mediation and thus the RSPO decided to establish an independent panel of experts to evaluate the parties’ claims.⁴³ Herakles withdrew its membership from the RSPO shortly thereafter.⁴⁴



Tensions increase in the project area

SGSOC's withdrawal from the RSPO and its publicised intention to clear the forest and plant 2,000 hectares of oil palm greatly increased tensions between proponents and opponents of the project. Residents of Fabe village held a demonstration against SGSOC in June 2012. Four villagers were arrested following the incident. The director of SEFE, Nasako Besingi,⁴⁵ was physically assaulted by SGSOC employees in August 2012 as he toured villages to conduct sensitisation on the project. The end of the attack was captured on video by a France24 documentary crew that Besingi was guiding in the area.⁴⁶ Nasako Besingi was arrested with four of his colleagues in November 2012 while distributing anti-SGSOC T-shirts to local community members. The five were held for 48 hours and then released on bail although no charges were filed.⁴⁷

SGSOC promised to 'follow RSPO and IFC guidelines'⁴⁸ even following the withdrawal of their RSPO application, hinting that an FPIC process would still take place. However, SGSOC has since

■ *Huge logs abandoned on area being planted in Talangaye near Nguti / Fon Christopher Achobang*

launched the land consultative board process, as described earlier in this article, which would preclude a genuine FPIC process since the land consultative boards do not require broad consent. Furthermore, it is impossible to conduct an adequate FPIC process when local communities and NGOs are already facing intimidation and arrest.

Conclusion

The SGSOC case demonstrates how contractual rights and obligations and operational obligations can interfere with communities' rights to Free, Prior and Informed Consent. However, the issues raised by this particular case extend well beyond the question of FPIC to the illegality of SGSOC's contract, its repeated violations of Cameroonian law and its withdrawal from the RSPO. The Cameroonian Government has not helped to clarify these issues by refusing to publicly state whether or not it supports the project and by refusing to

promote voluntary best practice initiatives such as the RSPO. Cameroon has also refused to collect fines from the company for illegal logging and violating the court injunction on the project. Finally, the Ministry of Forests has contradicted itself by fining SGSOC for illegal logging and then subsequently granting an authorisation to fell trees in the permanent forest estate.

The incoherency of the government's position creates or reinforces the confusion of all stakeholders. The local governments in the area could interpret certain actions or inactions as showing support by Cameroon's highest public authorities and sending them tacit instructions. Meanwhile, local communities are likely to doubt the government's will or capacity to effectively protect their rights, particularly when these rights are so flagrantly violated, such as in the project area solicited by SGSOC.

As this is the first large scale agro-industrial plantation in Cameroon as part of the new wave of land investments on the African continent, the actions of Cameroon's government will set a precedent and send a signal to other potential investors. It will thus be imperative to adopt a cautious approach to the project's implementation in order to ensure the protection of community rights and the environment, and the promotion of local development.

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Endnotes

1. The first section of this paper is adapted from Nguiffo & Schwartz 2012.
2. H & B Consulting 2011: x. Herakles has provided a cadastral map for the land concession established by the Ministry of Lands which the company claims is 69,971 ha (see Appendix A). It is difficult to establish the exact size of the proposed concession since no land lease has been granted, the company's plans continue to evolve, and Herakles' public communications and reports have used figures ranging from 69,000-73,000 ha. After reviewing our research, the company provided the following comment:
"It should be noted that the company has since made public statements (eg at a June 2012 stakeholder workshop in Buea) and has also told the researchers of this paper that the number of hectares that will be developed will depend on findings from its participatory land-use mapping process with villages, as well as its environmental pre-development surveys. The researchers of this paper have been informed by the company that each of these activities are being conducted in phases corresponding to the company's multi-year build-out, and as such, the exact number of hectares that will be developed in its current concession are unknown at this time (the mapping and studies take place prior to each phase of land development)."
3. Ibid.
4. The complaint is available on the RSPO website at: http://www.rspo.org/news_details.php?nid=106&lang=1.
5. For example: A group of four NGOs filed a complaint against the parent companies of SOCAPALM using the Organisation for Economic Co-operation and Development (OECD) complaint mechanism due to SOCAPALM's abusive practices; film-maker Franck Hameni produced a film entitled 'The Big Banana' which paints a damning picture of PHP's Banana Plantations; CDC workers often strike in protest of working conditions and employee benefits; two SOSU-CAM workers and one *gendarme* were killed during labour protests in early 2012; HEVE-

- CAM workers also launched a strike at the beginning of 2012 which led to numerous arrests.
6. Carrere2010: 24. The five major companies are CDC, Pamol, SAFACAM, SOCAPALM, and Ferme Suisse.
 7. For a complete list of palm oil speculators in Cameroon see Hoyle & Levang 2012.
 8. Tableau Synoptique des Lots de Terres à Sécuriser. MINADER, 2012.
 9. Herakles has provided slightly different statistics to the authors in a recent communication. The company claims the Kupe Muanenguba bloc is 39,371 ha while the Mundemba-Toko block is 30,600 ha.
 10. Herakles has provided the following population figures following a 2011 census. The figures are widely believed to underestimate population sizes in the area by the authors and other researchers:

Nguti Villages	Village Population
Ayong	530
Babun	320
Betock	223
Bombe	220
Ebanga	274
Ekenge	155
Ekita	108
Manyemen	2057
Mboka	126
Nguti	573
Ntale	773
Ofrikpabi	62
Sikam	367
Sambaliba	100
Talangaye	340
TOTAL	6,228

11. Communication with Herakles Farms February 2013. The company also claims to have the support of the following Six Upper Balung villages: Talangaye, Ayong, Ebanga, Manyemen, Sikam and Sambaliba. Herakles also stated its intention to avoid the Betock and Baro villages after discussions between the parties.
12. Interviews with villagers in Talangaye, 2012.
13. Interviews with villagers in Manyemen, 2012.
14. Interviews conducted with villagers in Ayong, 2012.
15. This figure does not include residents from Nguti sub-division that also fall within the proposed concession.
16. Herakles has disputed the above population figures and provided the following table:

Sub-divison	Village	Population
Mundemba		
	Beboka	102
	Esoki	147
	Fabe	214
	Iwei	33
	Lipenja II	137
	Massaka	87
	Meangwe II	240
	Meta	20
	Mokange	68
	Mokango	161
	Ndiba	26
	Mundemba Total	1,235
Sub-divison	Village	Population
Toko		
	Bareka I	109
	Betika	21
	Bweme	64
	Ikoti I	31
	Ikoti II	38
	Ipongi	87
	Kuma	31
	Lipenja I	301
	Lobe	32
	Loe	5
	Manyaka	30
	Mayeike	2
	Mobenge	83
	Toko Total	834
Mundemba-Toko Total		2,069

17. Herakles argues that land set aside for agriculture was intended for agro-industrial cash crop production, while many villagers feel they have lost sovereignty over a large portion of their traditional lands which has had a detrimental impact on livelihoods (primarily farming, hunting and gathering).
18. Interview, 2012.
19. Fact finding mission on Herakles Farms (SGSOC) oil palm plantation project, February 2013. Available at: http://cameroonveritas.files.wordpress.com/2013/04/03_01_2013_report-fact-finding-mission-sgsoc.pdf
20. Section 8.2. Establishment Convention By and Between the Republic of Cameroon and SG Sustainable Oils Cameroon PLC. Available at <http://cameroonveritas.files.wordpress.com/2011/08/sgsoc-convention1.pdf>.
21. Section 3.2 of Establishment Convention.
22. Section 3.3(a)(iv) of Establishment Convention.
23. Section 3.3(a)(v) of Establishment Convention.
24. Section 4.14 of Establishment Convention.
25. Assessment of High Conservation Value on the SGSOC Concession for Oil Palm Development in South-Western Cameroon. Page 39. March 2011.
26. See Observateur Indépendant, Rapport N° 040/OI/AGRECO-CEW. http://www.oicameroun.org/index.php?option=com_docman&task=doc_download&gid=131&Itemid=20. Herakles claims the reports were based upon a misunderstanding between the Ministry of Forestry and the company and that the fines were later retracted. However, Independent Observer reports are validated by the Minister of Forests and there is no process to waive fines.
27. Establishment Convention By and Between the Republic of Cameroon and SG Sustainable Oils Cameroon PLC.
28. Article 8.2. Republic of Cameroon. 1994 Law on Forestry, Wildlife, and Fishing. 'The Ministers in charge of forestry, wildlife, and fishing may, by reason of public interest, and in consultation with the populations concerned, may temporarily or permanently suspend the exercise of logging rights, when necessary. Such suspension shall be done in consonance with the general regulations on expropriation by reason of public interest.'
29. Article 26 of the 1994 Forestry Law: '(i)The instrument for classifying a State forest shall take into account the social environment of the local population, who shall maintain their logging rights. (ii) However, such rights may be limited if they are contrary to the purpose of the forest. In such case, the local population shall be entitled to compensation according to conditions laid down by decree...'
30. Article 11 of decree N°2005/0577PM of 23rd February 2005 to lay down the modalities of the production of environmental impact assessments, Article 11 (1): 'La réalisation de l'étude d'impact environnemental doit être faite avec la participation des populations concernées à travers des consultants et audience publique, afin de recueillir les avis des populations sur le projet.' (2) 'La consultation publique consiste en des réunions pendant l'étude, dans les localités concernées par le projet ; l'audience publique est destinée à faire la publicité de l'étude, à en enregistrer les oppositions éventuelles et à permettre aux populations de se prononcer sur les conclusions de l'étude.'
31. Article 12 of decree N° 76-166 of 27th April 1976 to establish the terms and conditions of management of national lands: 'The consultative boards shall be appointed by the Prefect, shall represent a district or a sub-division, and shall consist of: the sub prefect or the district head, chairman; a representative of the Lands Service, secretary; a representative of the Surveys Service; a representative of the Town Planning Service, in case of an urban project; a representative of the ministry concerned with the project; the chief and two leading members of the village or the community where the land is situated.'

32. Herakles claims it has conducted participatory mapping in the following villages as part of its FPIC process (though FPIC requires that participatory mapping precede attempts to acquire land): Talangaye, Sikam, Ayong, Ebanga, Manyemen, Sambaliba and Ekita of the Nguti sub-division, and with Fabe, Esoki, Mokango, Massaka, Mokange, Bweme, Mobenge, Ikoti 1 and 2, Ndiba, Iwei, Manya, Mayeike, Lipenja I, Lipenja II, and Kuma of the Mundemba–Toko block.
33. De Schutter 2012.
34. '*mises en valeur*' in French.
35. Cameroon Tribune 2012.
36. SGSOC's withdrawal letter from RSPO. Available at http://www.rspo.org/file/PDF/Complaints/NPP_APPLICATION_LETTER.pdf.
37. See Forest Peoples Programme's FPIC Guide for RSPO companies for more details, http://www.rspo.org/file/FPIC%20and%20the%20RSPO%20a%20guide%20for%20companies%20Oct%2008_cover.pdf.
38. Wrobel 2012.
39. The full list of villages includes: Betock, Ebanga, Ayong, Talangaye, Manyemen, Ntale, Bombe Konye, Mungo Ndor, New Konye, Ekita Village, Ekenge, Mboka, Baro, Mbaro, Fabe, Meangwe II, Lipenja I and Toko.
40. Herakles claims to have launched participatory mapping exercises since our field survey was conducted, though at the time of publication, the company had yet to render these public.
41. *SEFE vs SGSOC*. Suite N HCN/003/2011/1M/2011. 31st August 2011. Mundemba High Court.
42. See http://www.rspo.org/news_details.php?nid=117 for a partial list of complaints.
43. In the interest of full disclosure, two of the three co-authors of this article were parties to the complaint: Brendan Schwartz and Samuel Nguiffo.
44. See http://www.rspo.org/file/PDF/Complaints/NPP_APPLICATION_LETTER.pdf for the letter of withdrawal.
45. Herakles Farms claims that Besingi's views are not representative of the local communities—an assertion which the authors of this report disagree with. The company also asserts that he represents a rival palm oil initiative called Sustainable Africa Palm Oil Council (SAPOC).
46. Footage of the assault is available in the documentary produced by France24, <http://www.france24.com/en/20121002-planet-hope-cameroon-palm-oil-rush-forests-development-agriculture-biodiversity-villagers-animals>.
47. See the following link for a detailed explanation of their arrests <http://www.fidh.org/Cameroon-Arbitrary-arrest-of-and-12517>.
48. See http://www.rspo.org/file/PDF/Complaints/NPP_APPLICATION_LETTER.pdf.

16 Democratic Republic of Congo: Congo Oil and Derivatives, SARL

Stéphanie Vig with Jean-Marie Muanda¹

Location of area studied

The concession investigated is located in Bas-Congo province in the Muanda territory, which covers 4,265 km² and is home to 152 villages spread over three sectors: Assolongo, Boma Bungu and La Mer. The location of Muanda territory is attractive as it runs along the Congolese coast of the Atlantic Ocean, from the mouth of the Congo river to Matadi city, the seat of the governmental administration of Bas-Congo province, where two international ports are located: Boma and Matadi. Bas-Congo is the only province of the Democratic Republic of Congo to have access to the Atlantic Ocean.

The concession investigated covers an area of 10,000 ha and is located within two Forest Reserves: the Muba and the Kiemi Reserves, which are classified, according to the Forest Code, as ‘subject, in line with a classification act, to a restrictive legal regime concerning usage rights and exploitation rights’ (Art 10, Forest Code).² The Forest Reserves of Muba and Kiemi are of 12,244 ha and 2,150 ha respectively. The Muba Reserve is the second largest Reserve in the province of Bas-Congo, and is home to customary lands accessed by many local communities for their subsistence activities, including hunting and gathering. Both Reserves are rich in biodiversity and contain the only sources of water to which several communities have access.

■ *Delimitation of Congo Oil and Derivatives’ concession in Muba Reserve, Bas-Congo / Stéphanie Vig*



Communities living in the area

The customary lands within the Muba Reserves are traditionally owned by one tribe, the Woyo, and two clans, the Mbalamuba and Mamboma. These communities do not self-identify as indigenous. Most consulted communities affirmed that their ancestors had sold part of their customary lands to the Belgian colonial administration in order to create the Muba Reserve.³ However, a number of them expressed doubts as to the validity of this surrender of lands, notably because it was forced upon them⁴ under unfair conditions⁵ and because those who approved the surrender did not have the authority to do so.⁶

Some communities pointed out that although their ancestors ceded part of their lands to create the Muba Reserve, they did not know the surface area surrendered and wished for



■ *Muba Village, Bas-Congo / Stéphanie Vig*

the government, in collaboration with the affected communities, to clarify the extent of the surrendered land.⁷ Two communities declared not having surrendered part of their customary lands for the creation of the Muba Reserve.⁸ Two of the consulted communities are planter ('planteur') communities who rent plots in the Muba Reserve for their agricultural activities.⁹ These communities are not customary owners of the lands that they rent.

All consulted communities access the Muba Reserve for their subsistence activities. Many enter it illegally without the knowledge of the forestry guards, whereas for others, access to the Reserve is tolerated. Some community members admitted that there are very few forestry guards supervising the Reserve and that it is easy to access it without being caught.

With regards to the land occupation system, the study revealed that for customary communities, the land belongs to the family and is transmitted through the family. It is possible to rent part of a family's land in exchange for monetary compensation or goods, but in this case, the family Chief must bring together his family and discuss

the transaction. Once the transaction has been concluded, the family Chief must ensure that an equitable sharing of received goods is achieved for all family members. He must under no circumstances carry out a transaction for his own personal profit. Normally, land cannot be sold, except under very rare circumstances.¹⁰ In such a case, the family must also be consulted.

In cases of conflict between community members, the involved parties must seek to resolve their dispute through the village Chief. If this fails, the group Chief will attempt to resolve it. If a community wishes to make a complaint regarding any matter related to its lands, it must appeal to the Site Manager (Chef de Chantier) who transmits the complaint to the Brigade Chief, who in turn informs the Provincial Coordination of the Ministry of Environment, who in turn informs the Provincial Ministry of Environment, and in turn, the National Ministry of Environment. It can take a considerable amount of time before a complaint is taken into consideration by the National Ministry of Environment.¹¹ It

should be noted that this process appears to be relatively informal rather than regulated by formal rules.

Relations between the State and communities

Several community members consulted affirmed that the State is present when it comes to tax collection or the collection of payment for services, or for ‘swindling’ (‘rançonner’). Some claimed that there had been intimidation from the authorities, ‘taxing’ and arbitrary arrests. The overall perspective expressed by the communities was that the State did not care about their wellbeing and that when it came to investing in the communities and improving their living conditions, communities were often left to their own devices.¹² The poor condition of roads was the object of recrimination on the part of many communities. Two planters’ communities consulted spoke of the difficulties they faced in selling their agricultural products, given that markets are difficult to reach because of the poor road conditions. Representatives of these two communities said that they welcomed the project because they hoped that it would bring about an improvement in roads (although this is not based on any engagement on the part of the concessionary company).

We live in an enclaved area and the arrival of the company will disenclave this area. You have seen the roads and the bridges – what do you propose? Will you disenclave this area for us?¹³

We regret that the State does not assist us in repairing the roads...We have adopted this position knowingly (that is to say, the position of being in favour of the project). You know, we face great difficulties here in Yana. At the time of Farabola (a timber company that recently went bankrupt) we lived very well because our products could be sold out in Boma. We easily got cash in. Now, over 5 km of roads have been opened up by us and we want to have the means to sustain our children’s education. Because of the difficulties we face, we do not know what to do.¹⁴

Company investigated

The 10,000 ha concession was granted to Congolese Company Congo Oils and Derivatives SARL (COD). Although the company was created in DRC¹⁵ and its technical Director affirmed that it is entirely Congolese and that no foreign interests are involved, it seems however, that this is not the case. A guarantee from MIGA (Multilateral Investment Guarantee Agency) was in fact approved in 2009 to promote the investment of Lebanese companies in COD. The guarantee appears to have been approved for a period of ten years, in order to cover the risks of transfer restrictions, expropriation, war and civil unrest. The project being subject to a guarantee includes the establishment and operation of a vegetable oil refinery in the port city of Boma. It is expected that the factory will produce refined, bleached and deodorised palm oil, as well as degummed soya bean oil, and will have a capacity of 140 tonnes of oil per day. This production would serve local markets which depend partially on imports, and possible neighbouring markets, including in Angola.¹⁶ Furthermore, COD’s website is a sub-page of the website of a Lebanese ‘holding’ company which seems to be very much implicated in the agriculture industry. Apart from COD, each company mentioned on this website is of Lebanese origin.¹⁷

COD has already established a factory for the production of edible oil and biocarburants in Boma, which allows it to process and commercialise edible oil imported from Malaysia. The company expects to produce bio-carburants from locally produced palm oil and soya oil.¹⁸ It is unclear whether the MIGA guarantee has allowed for the establishment of this factory or if it will allow its expansion. It should be noted that a report from the Bank Information Center (BIC) of December 2011 reveals that the guarantee is inactive.¹⁹ It is not possible at this stage to know if the guarantee has always been inactive or if it became so for a particular reason.

In their meeting with the technical Director of the organisation, the researchers were informed that COD had already begun a project in collaboration with the Dutch NGO SNV, in which COD will buy the production of small-scale oil palm planters in Mayombe region and train them in the management of oil palm and fresh fruit bunches, in order to ensure the quality of produced palm oil. The technical Director indicated that the small-scale oil palm planters were happy with this project because it would allow them to sell their products without having to travel long distances to reach markets. The project is still at its initial stages and consultations are underway between COD, SNV and the producers.

When asked about the 10,000 ha concession acquired by the company, the Director expressed the fact that he did not agree with the project and that he had expressed this view to the Director General of the company. According to him, the project is too costly and not profitable. He thinks that the exploitation of the concession is a long-term project and that if the first project with the smallholders does not work out, then the company can turn towards the concession. He also claimed to know very little about the project and the plans of the Director General with regards to it. He believed, however, that the plan would be to first evaluate the state of the land which is the object of the concession, and then to clear it ('there are many old trees there'). COD will then work in collaboration with an agronomist in order to determine how to introduce a new type of palm tree: the dwarf palm tree. This type of palm does not exist in Bas-Congo at the moment.

When asked whether the company had consulted local communities owning land or having access to land within the concession, the technical Director replied with surprise that he did not even know that there were communities in this area.

We don't even know if there are people who are going to be able to work for us! Who is going

to establish themselves there? For now, there is nothing there, there is no project.

The technical Director claimed not to be aware of any plans for soya production. It came out from the meeting that no consultation or ESIA had been undertaken by the company prior to obtaining the concession.

Legal status of the company's rights to land

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The concession contract

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An examination of the concession contract reveals that it was concluded on 11th June 2009 between the Bas-Congo Province Governor, Mr. Simon Mbatshi Batshia, and Congo Oil Derivatives SARL, 'represented by Mr. Pierre Muanda Mvumbi Général Manager, pursuant to a proxy by Monsieur Ralph Freiha President of the company'. It is interesting to note that Mr. Ralph Freiha is one of the beneficiaries of the MIGA guarantee and is the Vice President of Freiha Holding (the company under whose website the COD web page is located).

The contract is very short and consists of two pages only. Its preamble indicates that COD 'will establish a vegetable oil refinery with a production capacity of 300 tons per day.'

In order to guarantee

on the medium-term, the provision of raw materials to this refinery, CONGO OIL company projects to cultivate dwarf palm plantations and soya plantations in the Bas-Congo province.

The contract also reveals that COD initially approached the Bas-Congo Governor in 2008 to obtain 10,000 ha of arable lands in the forest reserves of MUBA and KIEMI/TETI

...designed for reforestation, in the form of 5,000 ha in each of these reserves for the cultivation of dwarf palm trees and soya.



■ *Congo Oil and Derivatives Plant, Boma, Bas-Congo*
/ *Stéphanie Vig*

The Governor would have referred COD to the Brigade Chief of the Reforestation Project of Mayumbe. The preamble of the contract states that the Brigade Chief

...considered the request...and submitted a project for a contract with the company for the perennial plantation for signature by the Province Governor.

The latter then transmitted the contract project to the National Ministry of Environment

...given that the management of forest reserves was under his exclusive competence.

On 5th May 2009

after having raised the existence of a moratorium suspending the attribution of new forest concessions, [the National Ministry of Environment] nonetheless authorised the Governor of Bas-Congo Province to 'consider the possibility of leasing a forest concession to CONGO OIL AND DERIVATIVES SARL of the order of around 10,000 ha on one of the targeted sites, in order to carry out the cultivation of palm and soya.

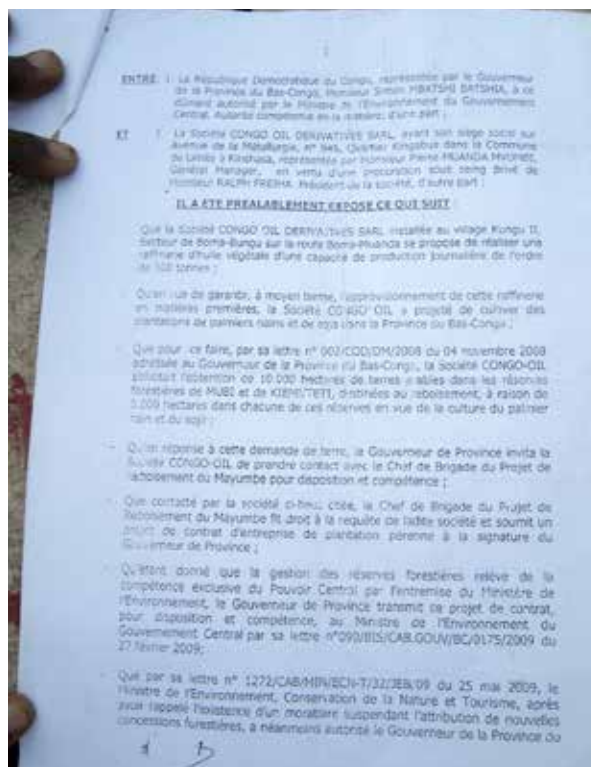
The Governor of Bas-Congo then approved the granting of the concession to COD. The seven clauses of the contract reveal that:

- The concession covers an area of 10,000 ha, of which 5,000 ha are in the Muba forest reserve and 5,000 ha in the Kiemi/Teti forest reserve (Art. 1). It is strange that the contract projects 5,000 ha to be allocated in Kiemi Reserve, as this Reserve itself only covers an area of 2,150 ha. Some expressed fears that this undoubtedly meant that nearly the entire concession would be located in Muba Reserve.²⁰
- The lands will be subject to delimitations (Art 2) and will be used exclusively for the plantation of dwarf palms and soya without burning exploitable scented woods (Art 3).
- COD must respect the conditions imposed by the Mayumbe Reforestation Project (conditions which are specified in a separate company contract in line with Article 6) (Art 4).
- Failure to comply with these conditions or changes in the use of the land concession constitutes a cause for the automatic termination of the contract (Art 5).

The company contract for perennial plantations

A second company contract was signed between COD's Director General, Mr. Muanda Mvumbi, and the Mayumbe Reforestation Project Chief, on 13th June 2009, in line with the concession contract. It must be noted that the contract was in some parts illegible and it is impossible to decipher some of its contents. A number of important elements were identified in the contract:

- It is of a duration of forty years and renewable (Art 23).
- It allows the cutting of underbrush to plant, and the cutting of 'useless trees', but the felling of timber is subject to a 'felling authorisation issued by the Province Governor' (Art 4, difficult to read).
- COD can exploit trees cut down for clearing and with market value, for sale or personal use, in line with the restrictions formulated in article 6 (illegible) (Art 7).
- COD must pay 'the Democratic Republic of Congo a single flat fee calculated on the basis of 100 Congolese Francs per hectare to cover the costs of demarcation of the granted concession at the time when the land is acquired' (Art 12). The Brigade Chief of the National Reforestation Service stated that companies typically pay 500 to 1,000 Congolese Francs per hectare.²¹
- It seems that the oil palm plantation will be established to include scented wood trees such that for each hectare, 216 palm trees and 40 scented wood trees will be planted (Art 15).
- Drainage and intoxication of rivers running through the forest reserves is 'strictly forbidden' (Art 14).
- Hunting in 'these state forest Reserves intended for reforestation, and initially established for the protection and conservation of all within it', is forbidden (Art 14). It is strange to include a reference to 'the protection and conservation of all that is there' since the felling of trees is planned for the establishment of the plantation.



■ Concession contract between the Governor of Bas-Congo and Congo Oil and Derivatives / Stéphanie Vig

Neither the concession contract, nor that of the company, mentions riverine communities or their rights to the lands granted as concession, despite the fact that the Forest Code stipulates rights of use for them (Art 36 – 39).

Legality of the concession

A study of the concession contract reveals that it is in blatant violation of the Forest Code. The Muba and Kiemi Reserves are classified Reserves and usage rights in this type of forest are strict and limited, and are to be exercised exclusively by riverine populations (Art 36 – 39, Forest Code). The commercialisation of forest products collected under usage rights is not allowed, except for certain fruits and products specified in a list determined by the provincial Governor (Art 37, Forest Code). Only protected forests and permanent production forests can become concessions. Concessions must be allocated for a maximum period of twenty-five renewable

years (COD's concession contract is for forty renewable years).

The concessionary is responsible for developing a management plan for the forest and the administration in charge of forests must ensure that riverine populations have been consulted on this matter (Art 71 – 76, Forest Code). Information gathered during the field study reveals that no consultation was carried out with riverine populations and that no management plan for the forest has been developed.

The attribution of forest concessions (on non-classified forests) must be achieved through adjudicatory means (Art 83, Forest Code) and must be preceded by a public investigation, with the aim to establish the nature and extent of rights of parties on the forest to be conceded, with a view towards their eventual compensation (Art 84, Forest Code). The concession contract must be composed of two parts: the contract itself which determines the rights and obligations of parties, and a 'cahier de charges' which determines the specific obligations of the concessionary (Art 88, Forest Code). The 'cahier de charges' must include a clause pertaining to the establishment of socio-economic infrastructures for the benefit of local communities (Art 89, Forest Code). The forest concession contract must be signed by the Minister on behalf of the State (it seems that this is the Minister of Environment, but this is not specified in the Forest Code, Art 92). These conditions have all been violated in the case of the contract in question.

What has the government and/or company done (or not done) to recognise the rights of communities to customary lands, or to respect their right to FPIC?

It appears that no measures have been undertaken to ensure the recognition of rights of communities to their customary lands, or to FPIC. No community reported having been consulted with regards to the COD concession project. It must also

be noted that the Technical Director of COD admitted not knowing if there were communities within the concession land or in close proximity to it. Some communities were only vaguely informed of the project²² whilst others were only informed of it during the researchers' own field investigation.²³ No community knows what will happen to their lands and to their usage rights over these lands once the concession is established, and many expressed their fears for the future and for the destructive impact that this project will have on their subsistence.²⁴

Furthermore, it would appear that no ESIA has been undertaken. The Cabinet Director of the Bas-Congo Ministry of Environment and the Coordinator of the Provincial Coordination of the Bas-Congo Ministry of Environment indicated that their offices should normally have been involved in the process of concession granting, but that they were not. A delegation of the provincial Coordination should have visited the targeted land, carried out a preliminary study and produced a report for the Ministries of Environment (national and provincial) and for the Governor of Bas-Congo. The Coordinator of the Provincial Coordination confided that he would never have given a favourable opinion to the Governor if he had known that the 10,000 ha concession would be located within a forest (as opposed to savannah). He added, just as the Cabinet Director did, that he had not seen the contract despite the fact that he had attempted to get a copy of it several times. The Coordinator confided that if the concession has been allocated in forest, then he would seek to put pressure on the Governor to revise this decision. The Cabinet Director also confided that the Bas-Congo Ministry of Environment supported our work and hoped to obtain our report in order to shed light on the circumstances under which the concession was granted and its consequences²⁵.

It is interesting to note that the Coordinator mentioned that his services always take into account the rights of local communities

before giving their views to the Ministry of Environment and the Governor of the Province regarding a particular project. Although this has not yet happened, if a community were to oppose itself to a project, he thinks that the project in question could not go ahead 'as this would cause unending conflicts'²⁶.

The Site Management Head who takes part in the demarcation of the concession indicated that he would seek to avoid the fields of planters in the delineation of boundaries. To this end, he will draw the concession borders around these fields and affirms that 'no planters will be prejudiced (lésé)'.²⁷ The Chief of the National Brigade Service also affirms having asked those responsible for delineating the concession not to touch the planters' fields.²⁸ The community planters' representatives of Farabola have confirmed this.²⁹ However, it should be noted that the planters are not the traditional owners of the lands targeted for the concession and no discussion has taken place over the rights of its customary owners.

What understanding do communities have of the FPIC process?

Communities indicated that prior to any project, the State had to consult the Group Chief, the village Chiefs, the village leaders and the affected communities. The State

must respect the opinion of the communities and must abstain from establishing projects which they oppose.³⁰

In one village, community representatives pointed out that given that their ancestors had surrendered their lands to the colonial administration, they had no say regarding the use of these lands, but hoped that the State would take decisions that are 'reasonable for its population'.³¹ In another village, community representatives admitted that they did not know that they have a right to be consulted in relation to projects that may have an impact on their lands.³²

What is the government doing to allow companies to act in conformity with international norms and voluntary industry standards?

It would appear that the government has not yet established measures to ensure that the right of communities to their land and to FPIC are respected. Although the Coordinator of the provincial Coordination of the Ministry of Environment indicated that he always takes into account the rights of communities in preliminary investigations, there is reason to question the veracity of his statement.³³

■ *Consultations with members of Weka village community, Bas-Congo / Stéphanie Vig*





■ Meeting with former *Chef de brigade du service national de reboisement, Bas-Congo* /S téphanie Vig

In practice, how are States laws or policies supporting or creating obstacles to the realisation of the right to FPIC?

In the researchers' meeting with the Coordinator of the Provincial Coordination of the Ministry of Environment of Bas-Congo, the Coordinator pointed out that even if the contract violated the Forest Code, 'it is often the politics that determine the outcome'.³⁴ This statement reflects well the cleavage which exists between laws 'on paper' and in practice. Attempts to discuss the legal framework with regards to forest concession grants with different governmental authorities consulted revealed that several among them do not fully understand and do not respect the rules prescribed by the law. Furthermore, the Cabinet Director of the Ministry of Environment of Bas-Congo indicated that there are disfunctionalities between the National and Provincial Ministries of Environment.

All the money in the country is managed at the national level, there are not enough transfers of money to the provincial level.

This lack of funds is the reason stated by the Provincial Coordination of the Ministry of Environment for the fact that a preliminary study was not carried out.³⁵

There is reason to question the fact that the Provincial Coordination and the Ministry

of Environment of Bas-Congo had, prior to our visit to the field, never yet seen the concession contract, even though this was two and a half years after it was signed. These key actors should have been involved in the granting process and their exclusion from this process raises a number of questions.

In practice, what are the main obstacles to the realisation of the right to FPIC and to lands of local communities?

One of the main obstacles which came out of the case study was the fact that the communities were not informed of their rights, and more particularly, of their right to FPIC. For example, community representatives of the group of Lele Sikila village claimed that they were ignorant of the fact that they had the right to be consulted in relation to activities that may have an impact on their lands.³⁶ Furthermore, as illustrated by the case study, communities are often placed in a situation of *fait accompli*, where they only obtain information on a project after it has been established or approved. Community members do not have the necessary resources to protect their rights. They claim to feel helpless in the face of authorities and many of them report already having suffered from harassment from the authorities.

Other important elements

The site operations Chief of Kiemi and the Brigade Chief of the National Reforestation Service both claimed that the concession was legal, as the forest was intended for reforestation and that the concession would allow for the plantation of dwarf palm and soya. They were unable to provide clear explanations for their statement, but it does not appear to be backed by the Forest Code which states, at article 13 that

Reforestation perimeters belonging to the State or decentralised entities are also subject to classification.

Article 1 of the Forest Code defines reforestation as

...an operation consisting of the planting of essential woods in a forestry area.

In the light of the fact that classified forests

...are those subject, based on a classification act, to a restrictive legal regime concerning rights of use and exploitation (Art 10, Forest Code)

and that they cannot be granted as concessions, it would be very surprising if part of the reforestation perimeter could become part of a concession for the establishment of plantations considered as 'reforestation'. When asked his view on the clearing of 10,000 ha of virgin forest to establish a plantation, the Brigade Head of the National Reforestation Service replied that

you must not think that in one or even ten years the whole forest will be cleared!...The forest is there to be exploited. If you don't want the forest to be reconstituted, how will we live? The trees in this forest are mature, it is important for it to renew itself, we are not going to expose the forest to desertification, are we?

The Site Chief of Kiemi and the Brigade Head of the National Reforestation Service also both stated that the concession was granted for reasons of national security. The concession is indeed located near the border with Angola, and according to them, several rebels are hiding in the forest and entering DRC illegally. The Site Chief and the Brigade Head believe that establishing a plantation will help resolve this security problem.

Finally, it is worth pointing out that it would appear that two petroleum blocs have already been allocated to Energulf Petroleum and Sorestrum Petroleum respectively, in Muba Reserve. In the light of the fact that Muba Reserve covers 12,244 ha, that the COD concession is of 10,000 ha and that two petroleum concessions have already been allocated, it is possible that conflicts will emerge between the different companies and that local communities will lose all access to the Muba Reserve.³⁷

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Endnotes

1. The authors would like to thank Robert Lelo, Patricia Mayolongo, Étienne Mbaki and Pascal Tsasa Luemba for their participation in the field study.
2. The classification order, pursuant to Article 16 of the Forest Code, would have allowed us to know the location and boundaries of the forest in question, its category, name, its resource management, the restrictions applied to use rights and the institution responsible for its management. Unfortunately, this document could not be obtained.
3. These are the communities of Nteve (Groupement Tshikayi), Muba, Weka, Lele Sikila, Phuela II, Lotshi and Beke villages.
4. Consultations with Muba village, 11th February 2012.
5. Consultations with Nteve village, Tshikayi group, 11th February 2012.
6. Meeting with Beke village chief, 14th February 2012.
7. Consultations in Weka, Lele Sikila and Lotshi villages, 12th and 14th February 2012.
8. Consultations in Kalombo and Phuela I villages, 14th February 2012.
9. These are the planting groups of Yana and Farobola.
10. It was impossible to obtain information on the circumstances under which land could be sold.
11. Meeting with Supervisor of the Ministry of Environment, Muanda territory, 10th February 2012.
12. Consultations in Nteve, Groupement Tshikayi, Muba, Yana, and Phuela II villages, 11th and 14th February 2012.
13. Consultations with planting group in Farobola, 12th February 2012.
14. Consultations with planting group in Yana, 11th February 2012.

15. Available at <http://www.presidentrdrd.cd/doct1230409j.pdf>.
16. Multilateral Investment Guarantee Agency 2009:52.
17. Available at <http://www.freiha.com/congo-congo-oil>.
18. Meeting with the Technical Director of COD, 13th February 2012.
19. Bank Information Center 2011: 32.
20. Meeting with Head of Environment Office of Bas-Congo, 8th February 2012. Meeting with Coordinator of ADEV, 9th February 2012.
21. Meeting with Brigade Head of the National Reforestation Service, 13th February 2012.
22. These are the communities of Nteve, Groupement Tshikayi villages and Muba, Yana, Weka, Farabola and Lele Sikila villages, 11th, 12th and 14th February 2012.
23. These are the communities of Kalombo, Beke, Phuela I, Phuela II and Lotshi villages, 14th February 2012.
24. These are the communities of Nteve, Tshikayi Group and the villages of Muba, Weka, Lele Sikila, Kalombo, Beke, Phuela I, Phuela II and Lotshi, 11th, 12th and 14th February 2012.
25. Meetings with Cabinet Director of Ministry of Environment of Bas-Congo and Coordinator of Provincial Environmental Coordination, 8th February 2012.
26. Meeting with Coordinator of Provincial Environmental Coordination, 8th February 2012.
27. Meeting with Kiemi Site Manager, 11th February 2012.
28. Meeting with Brigade Head of National Reforestation Service, 13th February 2012.
29. Consultations with planters' group Chief of Farabola and community representatives.
30. Consultations with Group Chief of Tshikayi and community representatives from the community of Nteve village, and consultations with village Chief of Muba and community representatives, 11th February 2012.
31. Consultations with village Chief of Weka and community representatives, 12th February 2012.
32. Consultations with Group Chief of Lele Sikila and representatives from Lele Sikila village, 14th February 2012.
33. Meeting with Coordinator of Provincial Environmental Coordination, 8th February 2012.
34. Ibid.
35. Ibid. and meeting with Head of Environment Office, 8th February 2012.
36. Consultations with Group Chief of Lele Sikila and community representatives from Lele Sikila village, 14th February 2012.
37. Meetings with Cabinet Director of Ministry of Environment of Bas-Congo, Site Manager of Kiemi and Brigade Head of National Reforestation Service 8th, 11th and 13th February 2012.

Conclusions and recommendations

Marcus Colchester, Sophie Chao and Norman Jiwan

Towards a balance sheet

The studies in this volume reveal that although the RSPO process has in some specific cases led to improved understanding of the key issues, both for communities and companies in achieving ‘sustainable development’ based on respect for fundamental human rights, and although some procedural improvements can be pointed to which may provide a basis for resolving some land conflicts, nevertheless, overall, many oil palm companies are not respecting customary land rights, are acquiring lands without consent, are violating or avoiding compliance with national laws or court rulings and are in obvious violation of the RSPO standard.

Procedural improvements

On the positive side, the studies show that there is some awareness among both companies and communities of the relevance of international human rights instruments to the operations and obligations of the private sector and the State with regards to indigenous peoples and local communities, particularly in relation to land rights. Many companies have committed to dialogue, negotiation and consultation as a means of resolving disputes with, and remedying grievances of, local communities, which should pave the way for reaching mutually beneficial agreements, satisfactory to all parties. Some companies have now developed conflict resolution mechanisms and Standard Operational Procedures (SOPs) in relation to customary land rights, conflict resolution, social development and information sharing, to guide their activities and interaction with local communities.

The notion of lands conceded being idle or vacant lands is gradually being dispelled as

companies are increasingly recognising that the lands granted to them by governments are in fact often encumbered by customary rights and inhabited by local communities who depend on them for their livelihoods and cultural traditions. Compensation for land and resources lost by local communities due to oil palm development is being paid more systematically by companies, and employment opportunities, sometimes in the form of smallholder schemes, are being offered to local communities as a means for them to benefit from this development. The provision of social welfare support, such as educational facilities, water supplies, medical health and village infrastructure, is now part of several companies’ commitments towards local communities, as part of a broader commitment to the improvement of their wellbeing and environment.

Lack of information

However, many challenges to the realisation of the right to FPIC of local communities remain unaddressed. Most relate to lack of transparency and information-sharing by the company to the affected communities prior to oil palm development taking place. Consent, where sought, is generally given on the basis of inadequate and partial information. Across the studies, it was found that insufficient information is being provided to local communities regarding the social and environmental impacts of oil palm development on their livelihoods and on their access and use of land. This includes lack of information on the nature of the development, its duration, the legal status of the company’s rights to land, how the development affects local communities’ rights, what happens after the expiry of their lease in terms of land rights and management rights, and details of the

compensation and benefits offered to local communities.

In most cases, the research found that local communities do not know of, or hold copies of, important documents such as Social and Environmental Impact Assessments, land tenure studies, concession maps, SOPs and conflict resolution mechanisms. In many cases in Indonesia, land title certificates issued to small farmers as part of an oil palm scheme are held by the companies and withheld from the farmers. Where village representatives hold copies of any of these documents, these are rarely shared with, or provided, to the wider community. In many cases, local communities are not informed that they have the right to this information in the first place. Many communities had not been informed that by releasing lands for oil palm development, they would weaken or extinguish their future rights to those lands.

Where provided, information tends to be given upon request of the communities rather than at the initiative of the company. Often information that is provided is partial or biased, with promised benefits and advantages of the development being emphasised while potential negative impacts on local communities' livelihoods, environment and land rights are downplayed. Such documents and information are rarely provided in the local languages of the communities. Even where records of requests from communities and company or government responses are maintained by the company, these are not routinely shared with local communities involved. Where management documents are publicly available, the process to obtain or view them can be long and complex, especially where local communities are not informed to whom they should address their requests within the company. Communities typically have no access to and very limited means to obtain independent information on the legal, economic, social or environmental impacts of the planned development, and neither companies nor governments offer assistance in this regard.

Furthermore, in the case of companies that are RSPO members the studies show that insufficient information is provided to communities regarding the RSPO itself as an institution, the requirements the RSPO Principles and Criteria (P&C) and the obligations of the member companies. In particular, the right of local communities and indigenous peoples to give or withhold their FPIC and what this entails is rarely explained in sufficient detail for them to exercise this right in practice.

In many cases, the right to FPIC is understood by companies as synonymous with consultation, which itself is often limited to the company informing the communities of the developments that will take place on their lands, rather than seeking their consent to these developments. Because communities tend not to be aware of their right to FPIC, they are reluctant and/or unable to argue for their right to withhold consent. Company SOPs on communication and consultation, as well as conflict resolution mechanisms, are rarely developed in collaboration with local communities or other affected parties, meaning they lack credibility in the eyes of these stakeholders.

In addition, effective participation in decision-making for local communities is hampered by lack of adequate information shared sufficiently in advance (ie 'prior') to developments on their lands. Companies and government in some studies claimed that respect for the right to FPIC is not applicable until the net land area is identified and an initial concession agreement is concluded with the government. This places local communities at a considerable disadvantage if their lands have been auctioned or licensed without their consent as their leverage in subsequent negotiations with the company is thereby substantially weakened.

Inadequate participation

Where carried out, consultations tend to be one-off rather than an iterative process of dialogue, discussion and negotiation,

meaning that communities are not given sufficient time to take in, reflect upon, and make decisions collectively regarding the company's operations. In some cases, no consultation was carried out at all by the company. Communities are rarely informed of their right to choose how they wish to be represented, with companies tending to work exclusively through the local government administration or government-designated leaders.

The participation of certain individuals in consultation activities (such as village heads) is often construed by companies and governments as equivalent to consent on the part of the whole community. This is especially a problem where corruption is endemic. This often leads to conflict within communities over decisions made above their heads by their representatives, who may have been selected and rewarded by the company, without prior internal consultation and information sharing with the wider community.

Where there are several communities living within a concession, as is often the case in large-scale plantations, the case of one particular community is often generalised to all other communities within the concession, regardless of differences in land tenure, land use, ethnicity and historical occupation and use of the land in question. Women continue to be marginalised in consultations and their participation neglected, meaning they are not in a position to contribute to decision-making or negotiations over the use of the land. In some cases, poor and/or landless families from within a community are similarly excluded from decision-making and benefit sharing.

Benefits from oil palm in terms of local development (employment, social infrastructure, water supplies and educational facilities) are often promised by companies, and may be the reason communities give their consent to the oil palm development. In practice however, it is often the case that the timeline and terms

for their implementation are not specified or the promises themselves not put in writing. Many communities resent the fact that companies, despite promising them jobs upon which basis they agreed to the oil palm development, do not prioritise them in terms of training and/or employment in the plantations, preferring instead to bring in workers from outside, who, the companies state, are more qualified and experienced.

Some local communities report having experienced intimidation and pressure from companies and company-hired security forces, as well as government entities, to accept the terms of the company, and are reluctant to voice their views for fear of reprisals. This sheds doubt over the degree to which consent, where obtained, is obtained free from coercion and intimidation, either explicit or implicit.

Lack of respect for land rights

Findings from the field also show that adequate and comprehensive documentation by the company of both the history and contemporary practice of customary land tenure is generally lacking. Where these exist, local communities are either insufficiently consulted, or only certain communities are consulted, leading to inter-community disagreement over land use and ownership. Furthermore, where initial acquisition of the lands took place before the RSPO was created, some companies are using this as a justification for why they were not respecting community rights in land. The RSPO standard, however, makes clear that where there are disputes, companies have an obligation to develop and apply mechanisms to resolve the conflict and to respect the right of communities to their lands.

Participatory mapping of customary lands and disputed lands is most often lacking. Where carried out, it tends to involve selected individuals rather than the wider community, and not all the villages within the concession area. Maps tend to be kept

by the company but not shared with the communities, and even where these maps are made in a participatory manner, the ownership of the map by the community itself is rarely acknowledged. Several companies were found to have planted out their whole concession, leaving little or no land for local communities to use for their own subsistence. In some cases, waterways and roads were blocked without community consent, restricting their access and mobility.

Legal boundaries of the concession and customary land boundaries are either not clearly demarcated in maps, not developed or mapped with the participation of local communities themselves, or not explained to these communities, leading to confusion over the extent and overlap of these lands and rights over them. This is particularly the case where there are several concessions in the same area, including subsidiaries of different companies. There is also continued lack of respect for the communal basis of rights among many local communities, and a tendency by companies and the government to permanently individualise lands, in ways that are contrary to customary tenure and that contribute to intra-community tension.

Unclear compensation and benefit-sharing

Compensation arrangements for land lost by communities to the companies are rarely negotiated with communities *prior* to the investment or operation. The process of providing compensation for lost land tends to be protracted and carried out on an individual basis, rather than based on the FPIC of the wider community, leading to intra-community disagreements where land is held collectively, so weakening collective systems of land governance. Lack of prior identification of land use rights also leads to cases of opportunism and manipulation of land claims by certain community members or outsiders, leading to compensation being paid to the wrong individuals. In other cases, compensation is being paid to village representatives who then fail to distribute

it among community members. Where compensation is paid, this tends to be for land lost by the community but not inclusive of the crops and/or structures they own on these lands, or the economic benefits that could have been derived over many years from the crops and structures that are lost. Such compensation is often nugatory, for instance less than US\$1 per ha in documented cases in Indonesia, while entailing permanent loss of community rights to those lands.

Escalating land conflicts

As a result of the lack of respect for local communities' rights to their customary lands and to FPIC, land conflicts of varying degrees of gravity are ongoing in most plantations, ranging from minor disputes over land, to village-wide protests, demonstrations, blockades and protracted court cases. While certain companies had developed mechanisms to resolve these conflicts, their focus is on the establishment of a conflict resolution process itself, rather than on the efficiency of this process in actually resolving conflict. The development of conflict resolution SOPs on paper by the company is seen by some communities as a strategy to avoid actually dealing with the problems on the ground.

Legal confusion

Findings show that while local and national laws tend to be respected by most RSPO member companies, inconsistencies within and between local and national laws, such as in relation to land tenure and land-use rights in some countries can be confusing and sometimes used by companies to selectively implement the law in ways that favour their interests. Changes in national and local laws can be difficult to keep up with and implement when the company has no system in place to track these in good time. The fact that national and local laws in some countries do not recognise or protect the right of indigenous peoples and local communities to use customary

law in the management of their lands and natural resources allows companies to neglect this right, despite its recognition both in international instruments signed and ratified by the country in question and under the RSPO P&C.

National laws and regulations in some countries only allow issuance of licenses for the development of oil palm over lands that are free of all existing use and ownership rights. In such cases, RSPO member companies wishing to develop an area for oil palm are unable to both respect community rights in land, and obtain a development license from the government, unless communities freely consent to relinquish all rights in land. In most cases companies are not informing communities about this fact, and communities are mistakenly under the impression that they have no choice but that their lands will return to them after the lease period ends.

International laws and regulations are routinely treated as secondary in importance to national and local laws, particularly where national legal frameworks are inconsistent with a State's obligations under international law. Where legal contradictions exist, initiatives on the part of the company and government to identify and remedy these through legal reform or other means are often lacking.

In some countries, lack of clarity over the roles, jurisdiction and responsibilities of governmental bodies (environment, land, agriculture, plantations, forestry, etc) and that of the company, leads to confusion over who is responsible for the supervision, monitoring and sanctioning of company activities. In some cases, different government agencies and the company 'throw the ball back' to each other in terms of their respective responsibilities. Companies are reluctant to respect community rights in land if this challenges the authority of the State over land tenure.

Furthermore, local communities are not provided with sufficient information or

material means to seek legal counsel in cases of conflict or unresolved land disputes with the company. Lack of knowledge of their legal rights under national laws undermines their position in formal court procedures, where they find themselves at a disadvantage. Many of these court cases are protracted and convoluted processes, or only allow for compensation rather than restitution of lands. The jurisdiction of the RSPO is ambiguous in cases of conflict over land and natural resources, and with regards to the rights of communities to accept the RSPO as a dispute resolution mechanism.

Lack of staff training

The case studies also reveal a common pattern in many of the companies that play a leading role in the RSPO. Whereas senior company executives and policy makers may have a good awareness of the RSPO standard and be intimately involved in debates about land rights, customary rights, FPIC, international human rights and dispute settlement, their operational staff on the ground lack such awareness. Field staff have not been effectively retrained to apply the RSPO standard; companies' SOPs may not have been revised and; the incentives schemes for operational staff have not been revised to encourage scrupulous adherence to the RSPO standards. The result is observance at the top and non-compliance in practice. In other words companies are only paying lip-service to the RSPO standard.

The case studies also show the extent to which communities are being divided by the imposition of oil palm schemes. Whereas the notion of FPIC as an expression of indigenous peoples' collective rights to their lands and to self-determination implies that companies should negotiate with communities or clusters of communities jointly, in most cases companies are negotiating with individual farmers either directly or through land brokers. The result is to break up and

divide communities causing serious social and political rivalry. This is not to argue that communities were once without their divisions and ruptures, but the case studies show how divisions have been severely exacerbated. In some cases, it is clear that this divide and rule approach is an explicit tactic of company staff charged with land acquisition. The study of land acquisition by PT Agrowiratama, for instance, points to collusive manipulation of the concept of customary rights by local elites and company personnel. In this case the company was preferentially recognising the land claims of a feudal Melayu elite based in the local cities, in order to negotiate the takeover of land, rather than the land claims of their one-time Melayu subjects, who were still living on and working the land.¹

Given that the credibility of the RSPO to deliver 'sustainable palm oil' depends on it being able to persuade retailers and consumers that RSPO-certified palm oil has not been produced through land grabs or ensuing human rights violations, these findings pose a significant challenge to the scheme. Substantial revisions of the RSPO's standards and procedures are evidently needed if it is to prevent land grabs and ensuing conflict. The findings of the 16 studies and updates carried out by the NGO consortium were thus used as the basis for recommendations for the revision of the RSPO Principles and Criteria in the course of 2012-2013.²

Certification

Several case studies indicate that certification bodies are not equipped with the set of skills required to adequately and comprehensively assess the degree to which FPIC is being respected, rendering it highly questionable whether auditors are sufficiently trained and aware of what FPIC entails and requires on the part of the company. The lack of a standard reporting format also means that while some audits are highly detailed in their content, others blanket over entire issues with general

statements lacking sufficient substantive evidence to back them.

In many instances, certification bodies are carrying out audits without engaging community members, or by conveniently extrapolating information obtained from certain individuals to the wider community, without ascertaining whether these individuals are self-chosen representatives of the overall community. This was the case for the CUC audit of PT REA Kaltim Plantations, where it was also found that the auditors were equating negotiation over terms of compensation with satisfaction of the requirement of FPIC by the company. In another instance, that of PT Mustika Sembuluh's audit by TUV Rheinland, the auditors' report makes no mention of community visits, with all interviewees being company staff and representatives, and where the only public consultation meeting involving non-company staff took place outside the concession. In this and other reports, it was also found that auditors are failing to identify and report on the actual extent and number of conflicts within the plantations, both minor and major. Last but not least, a worrying pattern identified is that of certification bodies becoming 'tied to' specific holding companies and auditing all or most of their subsidiaries. Under such circumstances, there is a risk that certification bodies may see strategic (and commercial) value in sustaining their professional relations with the holding company, at the expense of independent and impartial auditing.

Similar concerns to those above are raised by High Conservation Value (HCV) assessments which frequently fail to give due and balanced consideration to both the environmental *and social* dimensions of HCVs (particularly HCVs 5 and 6) and fail to involve local communities in the assessments (including in terms of HCVs 5 and 6, despite these being designed specifically to sustain communities' basic needs and cultural values). The result is that often, insufficient and/or inappropriately located HCVs 5 and 6 are being identified, or

worse, no HCV 5s identified at all, as in the case of PT Agrowiratama. In the cases of PT Mustika Sembuluh, PT SSS and PT BNM, the fact that the overwhelming majority of community members interviewed are not familiar with the concept, purpose and/or location of HCVs testifies to their lack of participation in both assessments and HCV mapping. Pertinent also to both HCV assessing bodies and certification bodies is the fact that audits and assessments are invariably shared with the company but not with the affected communities, even where these have been requested.

Inadequate frameworks

The studies also show a number of common features which have facilitated the takeover of indigenous peoples' lands. The most obvious is that national laws often do not provide a secure basis on which the affected communities can assert their prior rights in land. This not only allows the State to hand out these areas to third parties without regard for indigenous peoples' rights, but it also allows the companies to then deal with the local people from the position of being the legal lessees of land allocated to them by the government, placing the communities in a very difficult position when it comes to negotiating a fair deal. In many cases the national laws and procedures being used to preferentially allocate lands to companies are contrary to the same countries' obligations under international law and in some cases the procedures being used quite evidently violate provisions in national constitutions meant to guarantee protection of citizens' rights.

Even in countries such as the Philippines, where legal options do exist for the recognition of customary rights in land, the studies found that communities had not been provided land security under the law and so remained vulnerable to expropriation. In Thailand, lack of legal protection of indigenous peoples' rights coupled with State policies favouring agricultural expansion by migrant

smallholders is leading to the wholesale takeover of forest reserves, squeezing the hunting and gathering Mani people out of the last remaining fragments of their ancestral forests.

With the exception of the Philippines, in none of the countries investigated do national laws explicitly require government agencies or companies to obtain communities' free, prior and informed consent for operations planned on their lands. On the contrary, the studies show that laws, procedures and government policies favour the takeover of communities' lands without their consent. Land expropriation is justified, by invoking the national interest or the need to promote national development, reflecting persistent notions of 'eminent domain' whereby the State gives itself the power to arrogate lands for public purposes, even where private sector companies are the direct beneficiaries. This remains the case in Indonesia, despite that fact that in 2007 the UN Committee on the Elimination of Racial Discrimination expressly urged that Indonesia:

should amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples, in accordance with the Committee's general recommendation No. 23 (1997) on indigenous peoples... The Committee, while noting that land, water and natural resources shall be controlled by the State party and exploited for the greatest benefit of the people under Indonesian law, recalls that such a principle must be exercised consistently with the rights of indigenous peoples.³

A related finding is that whereas State policies explicitly favour the expansion of palm oil by corporate interests, this has not been matched by prior preparation of national land agencies to oversee processes of land acquisition and ensure due process. The result is that local authorities and land

agencies admit to being overwhelmed by the scale and rate of land transfers. In effect, the expanding oil palm sector is out of control.

Experiences with remedies

The studies also documented those communities affected by these operations who had sought to use various mechanisms for redress. In both cases in Malaysia, the indigenous peoples have had recourse to the courts but have faced exhausting delays in getting justice. In Sarawak, the community of Long Teran Kanan had waited 15 years to get a judgment, which was favourable to the community but in defiance of the RSPO standard was then promptly appealed by the government and companies. In Sabah, Genting Plantations had even contested for a decade the right of the community just to plead to the court. In almost all the other countries, communities and NGOs have not used the courts to achieve redress as they either lack the capacity or feel the laws are unjust, or doubt the independence of the judiciary.

The studies allow more mixed conclusions about the RSPO's own complaints procedures.⁴ In the case of complaints made about the operations of IOI-Pelita in Sarawak, the RSPO Complaints Panel was very slow to make any firm adjudication, did not, at first, uphold RSPO requirements and took four years to clarify the basis on which the dispute should be resolved. This lack of clarity also undermined the effectiveness of the pilot deployment of the RSPO's Dispute Settlement Facility, which has so far failed to get the parties to agree a process of remediation. The increasing number of complaints that the RSPO Complaints Panel are having to deal with also raises questions as to its ability and capacity to respond effectively and promptly to ongoing and emerging disputes. For instance, of the 31 complaints received up to 2012, only four have reportedly so far been resolved.⁵

Some NGOs have begun to worry that RSPO's focus on open dialogue and multi-

stakeholder negotiation results in reluctance to develop and apply effective sanctions on companies that are in evident violation of the RSPO Principles and Criteria, putting into question its ability to genuinely enforce the standard.

However, the studies showed greater effectiveness from the use of the RSPO's 'New Plantings Procedure'⁶ which provides for concerned parties to call for improved measures or remediation before plantings actually get underway. Early complaints using the procedure in Liberia were effective in getting Sime Darby to agree to remediation and improve its land acquisition process – processes that are now being applied – and appear to have persuaded GAR/GVL to at least admit to past mistakes and to promise improvements. It can be hoped that these two cases may yet lead to fairer outcomes for communities, in line with RSPO requirements.

A similar mixed conclusion comes from the experience with the IFC's CAO process which has been appealed to to address the problems in the plantations of the Wilmar Group. On the positive side the CAO Ombudsman's mediation efforts have helped resolve land disputes in three villages in Indonesia, and the CAO is now struggling to resolve disputes in a fourth area. On the other hand, six years after the complaint was filed, the CAO has yet to even start to address the systemic problems in Wilmar's wider operations. A case in point is PT PHP in West Sumatra which was raised in the initial complaint in 2007 but which the CAO has yet to even investigate. Moreover, despite repeated appeals the CAO seems unable to address the wider supply chain issues, a vital matter given that about 90% of the palm oil products actually marketed by Wilmar are sourced from non-Wilmar land holdings. Neither IFC staff nor the CAO has yet made any efforts to get the IFC's Performance Standards applied to the wider supply chain.

In the case of PT Mustika Sembuluh, another Wilmar subsidiary, the field

studies showed that it took four years for the company to acknowledge that it had caused significant water pollution due to mill effluents, and while an agreement with the community on compensation and rehabilitation of water courses was signed in January 2008, no sign of implementation of its terms were visible by 2012, when the community held further protests and road blocks demanding their water resources and customary land back. A second agreement was signed in June 2012 reiterating the community's demands, however given the precedent set by the company and the lack of enforcement mechanisms for these agreements, the community doubts whether the company will actually take action to remedy their grievances.

The case points to a weakness in the RSPO Principles and Criteria which requires a 'mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties'. However, the current indicators for compliance focus on process with a lack of concomitant requirements for actual and testified resolution of conflicts. The loophole means that actual outcomes of the resolution process may not be verified, with the result that a conflict resolution processes may exist only on paper and not in practice.

A more worrying conclusion that emerges from our experience with both the CAO and RSPO conflict resolution processes is that, apart from in exceptional circumstances, neither procedure can be activated by the communities without the help of local and even international NGOs. This is not because communities are unconcerned to seek redress, for in all cases they have tried other avenues first. Rather, language barriers, the use of technical jargon, technology gaps, communities' lack of awareness of their rights and of the RSPO and IFC standards, and limitations of resources and capacity, all conspire to prevent them being able to activate the bureaucratic machinery of the complaints procedures.⁷ Conflict resolution processes require sustained commitment

in terms of time, energy and resources to ensure effective follow-up and to keep the pressure on companies to remedy grievances. Yet NGOs too face severe limitations of capacity and resources. What this means is that only a very small percentage of communities are actually able to activate complaint mechanisms and seek redress, with the result that the majority of conflicts between the communities and companies endure.

Towards regulatory reform

It should come as no surprise that the expansion of oil palm plantations is in many cases impoverishing local farmers and causing land conflicts. After all, as Matthew Parker's magisterial history of sugar in the Caribbean teaches us, ever since their inception, monocrop plantations have been associated with land concentration, exploitation of labour, slavery-like practices and the ruination of indigenous peoples.⁸ What was true in the 17th and 18th centuries remains true today: that free-market plantation development, by businesses seeking their own profit in the absence of an adequate regulatory framework, encourages exploitative practices.

It is such knowledge that has informed the revised approaches of the World Bank⁹ and the FAO,¹⁰ both of which are designed to promote just development processes through legal, policy and governance reforms to protect indigenous peoples' and farmers' land rights, prevent 'land grabs', ensure fair processes of negotiation over land, build community capacity and ensure mechanisms for the resolution of land conflicts. In addition, the World Bank Framework and Strategy requires purchasing policies and traceability to ensure the application of its performance standards throughout the supply chain.

Unfortunately, as our detailed review shows, these aspirational reforms, worthy and necessary though they are, remain far from realised in the cases examined.

Communities' rights to their lands are not secured by law. Even the more progressive companies that are members of the RSPO are failing to respect customary rights effectively. Land grabs thus continue and land conflicts continue to proliferate. Companies required to negotiate land acquisition by respecting the principle of Free, Prior and Informed Consent are failing to adhere even to the basic guidance provided by RSPO.¹¹ Communities' capacity is undermined by their lack of awareness of their rights, of the meaning of certification processes and of laws and legal procedures. Court processes are beyond the reach of most and even where activated are failing to deliver redress. Both the IFC and RSPO complaints mechanisms, while worthy in intent and though they have established some important precedents, lack both the mandate and the capacity to remedy the huge numbers of disputes between companies and communities. Given the scale of the problem, they are not 'fit for purpose'.

When the RSPO first began to develop its standard through a 'multi-stakeholder' process, it consciously chose a 'voluntary' approach. It purposefully excluded government from its membership. It aimed to encourage B2B - 'business to business' - partnerships. It thus sets its standards independent of national laws, while taking into account international norms, laws and best practice as far as possible.¹² The RSPO left to a process of 'national interpretation' the challenge of working out how such a voluntary, generic international standard would actually fit with national legal and regulatory requirements.¹³ Some NGOs warned from the outset that incompatibilities would soon become apparent between national laws and the RSPO's standard, especially with respect to land rights.

In the event, the misfit between the voluntary standard and national legal frameworks did soon become apparent. However, it was the companies themselves that first voiced concerns. In Indonesia companies seeking certification under the RSPO system were

finding that after carrying out expensive High Conservation Value Assessments and setting aside forested lands to maintain these values, as the RSPO requires, district regents¹⁴ were then penalising them for not clearing and planting these lands, as required by the regulations governing their leaseholds. In some cases, the regents were actually taking these unplanted areas off the companies and re-allocating them to other companies, often not RSPO members, who were prepared to develop them. In effect one of the main aims of the RSPO, which is to redirect plantation expansion away from forested areas, was being frustrated.¹⁵ The findings led the RSPO Executive Board to convene a Task Force under which RSPO members could engage with the Indonesian government to find means to encourage legal or procedural reforms that would allow RSPO member companies to comply with both national laws and the RSPO standards. This dialogue is still underway.

What this process has been reluctant to face up to, however, are the real reasons that regents are keen to reallocate business leases. They do so not because they are anxious to see the letter of the law applied – after all government surveys in some parts of Indonesia show that the great majority of palm oil plantations are illegal¹⁶ – but because the allocation of land permits is the main way that local politicians enrich themselves and fund their election campaign chests.¹⁷ If regents can find an excuse to allocate the same lands twice, the rent-seeking opportunities are that much greater. It is these political and economic realities that reformists must face up to if their efforts are to have real effect.

Flags of convenience

It may be useful to recall that previous efforts to curb the socially destructive impacts of the global trade in plantation products have also faced unforeseen consequences. In the early 19th century, as soon as the British government commenced efforts to make it illegal to trade in slaves to supply overseas

plantations, British slavers discovered ways of dodging the law. First, they registered cargoes of slaves as nominally-owned by Spanish or Portuguese nationals, who were not prohibited from trading slaves. Then, many British ships were re-registered under foreign flags. Later, British crews were redeployed to foreign ships in exchange for a share in the profits. But the longest link between Britain and the slave trade was sustained through investments often of foreign slaving ships destined to supply the sugar plantations in British colonies or for cotton plantations in North America.¹⁸ The British government soon learned that abolition of the slave trade would require new forms of enforcement as well as more subtle laws designed to create full transparency in the existing market until ‘...step by step these measures squeezed each aspect of the trade and reduced its profit’.¹⁹

The parallels with efforts to eradicate malpractice in the palm oil sector today are striking. An example of flags of convenience comes from the Wilmar group which in March 2013 sold on its troublesome subsidiary PT Asiatic Persada to a closely related conglomerate, even while the IFC-CAOs Ombudsman was in mid-negotiation between impacted communities and the parent company.²⁰

While strenuous efforts are being made by IFC-CAO and RSPO to encourage adherence to higher standards by client or member companies, they are unwilling or unable to insist on the same standards in palm oil trades. The result is that companies like Wilmar, Cargill and IOI, which between them control some 80% of the global trade in Crude Palm Oil, while professing to apply the RSPO standard to the oil they themselves produce, do not apply the same standard to the oil they trade.

Likewise even RSPO members in the banking sector hide behind rules of client confidentiality to evade any requirement that they should engage with all their client companies to ensure they adhere to

the RSPO P&C or International Finance Corporation (IFC) Performance Standards (which are also the standards of the banks that subscribe to the ‘Equator Principles’).²¹

Recommendations

Each of the studies in this volume provides a set of recommendations to, inter alia, government bodies, companies, investors, banks, the RSPO, non-governmental organisations and affected communities to the end of providing remedy to documented grievances and human rights abuses. These recommendations can be generalised as pertaining to: the consent-seeking process; the tightening of standards; supply chain traceability; the strengthening of remedies; the recognition of rights by governments and; the rule of law and access to justice.

The consent-seeking process

The irregularities and inadequacies in the processes being undertaken by companies (often with the involvement of government bodies) to obtain the consent of local communities suggest that such processes need to be radically revised and rigorously monitored by independent third parties, to ensure that consent, where given, is done so freely, based on sufficient and comprehensive information, and prior to project permits being issued and operations initiated.

First, companies need to be aware and demonstrate greater respect for the fact that indigenous and tribal communities, whether they have written legal title or not, have a right to the lands and resources they have traditionally owned, occupied or otherwise used or acquired. In many cases, access to resources and rights over resources may be more significant to some communities than title to the land. The diversity of local communities, ethnic groups, land uses and rights within a single area must be much better understood and taken into account by the company in their interactions with these

communities, to avoid homogenisation of these different groups and interests, and to avoid generalising the views and needs of one to all the others. This also needs to be reflected in the standard so that assessors have guidance on how to assure that companies are addressing the diversity of groups that their operations will affect.

Second, stronger and clearer language is needed on the nature of FPIC as a right of indigenous peoples and local communities in existing certification standards, as opposed to it being treated as a form of consultation or 'socialisation', which are part of, but not tantamount, to FPIC. Human rights training at the level of the company, government and local communities can be instrumental to this end. In particular, the participation of local community members in consultation activities should be clarified to these participants as *not* being equivalent to their giving consent to the issues discussed. In the case of New Plantings, the early stages of the process of respecting the right to FPIC of local communities should be initiated prior to the identification of the net land area and well prior to obtaining final permissions.

Related to the point above, clearer language and company-level trainings should be provided on how respecting the right to FPIC of local communities is only achievable through a long-term, iterative, two-way process of consultation and negotiation, rather than one-off meetings. Stronger requirements are necessary on the part of the company to train and provide information to local communities on the RSPO, the P&C, and their obligations and rights under them. Companies should also take the initiative to offer third party training workshops and meetings for local communities on their right to FPIC. Evidence should also be sought from local communities that they have been given ample and sufficient time to digest information obtained and to make informed decisions among themselves. Companies should incorporate within their work plans, structured and repeated training on the RSPO P&C and FPIC to staff operating at all levels, from the grassroots

upwards, in order to ensure that all staff are accountable to, and responsible for, abiding by the standards contained therein.

In consultations and during the consent-seeking process, companies should develop with the local communities a time-scale for projected developments and how these developments will impact on them. For example, if a community is being promised jobs, how many will go to locals? When will those jobs emerge? How long will the community need to be able to survive without land before it gets a job to feed itself with? Can it sustain itself for this period? Companies should be wary of local elites and officials with vested interests in ensuring the concession goes ahead. They may be acting behind the scenes in a way that will compromise and undermine an otherwise ostensibly good faith process of observing the right to FPIC on the part of the company.

Furthermore, companies need to recognise that information-sharing with communities is their responsibility towards rights-holders involved, rather than a reactive action upon the request of rights-holders. All important documents, such as Environmental and Social Impact Assessments, HCV Assessments, land tenure studies, concession maps, Standard Operational Procedures and conflict resolution mechanisms, must all be translated into local languages and dialects and provided to local communities at the initiative of the company. Evidence to demonstrate that all relevant information and documents are *received* by local parties in a national or sub-regional language(s) suited to the affected communities, should be mandatory to ensure transparency and genuine communication and information-sharing.

In addition, information shared by the company and processes of interaction with local communities should be subject to stricter and more regular monitoring by independent third parties, to avoid partial and biased information that fails to address

tenure implications and other potential negative consequences of the development for local communities. More efficient and direct channels and procedures for communication between the company and local communities should be clarified and publicised, to ensure that communities are equipped with enough information to make use of these channels and address themselves to the right representatives when the need arises. There should be written records of meetings and visits by the company and government to communities available to the communities and third parties. Evidence of agreements with local residents ensuring access to adequate, clean water for drinking, cooking, bathing and cleaning purposes, should be mandatory to secure their livelihoods, health and basic needs.

In relation to labour, evidence should be provided that women workers are paid equally to men for equivalent work, and that the company prioritises local community members for employment opportunities, rather than labour brought in from outside. Women heads of families should have equal rights to be smallholders. Local communities should be given formal 'employment' with all the proper terms and conditions and labour rights complying with international best practice, instead of just day-labour/casual labour and contract work without any security. Day labourers should also have clear, agreed and written terms and conditions. All day labourers should have in their possession their own countersigned daily work record. Where plantations are developed through groups of small outgrowers, provisions must be made for adequate explanation of financing arrangements and any inherent risks to outgrowers prior to planting. After planting such groups should receive regular financial and management training which is also subject to an audit process.

With regards to HCVs, clearer and more ample information must be provided to local communities regarding the purpose of HCVs, in particular HCVs 4, 5 and 6.

Their participation in HCV identification activities and mapping is critical. Likewise, the security of access of local communities to HCVs both during and after the company's lease on the land must be clarified, and any changes to their access to the land explained fully prior to the identification of these areas. HCV assessments and management plans should demonstrate that credible measures have been taken to secure adequate areas for affected communities to meet their basic needs (eg food security, health, HCV5). In particular, provisions for the food security of local communities by the company should be highlighted and evidence to demonstrate that the company is supporting and securing local communities' sustainable access to food, either through the allocation or provision of land for cultivation, material support or other means.

Furthermore, palm oil operations should provide evidence that they are in compliance with rule of law, humane treatment and supporting a peaceful environment in agribusiness development areas. Companies should be obliged to show efforts to secure people affected by their operations from violence and arbitrary arrest and to not make use of mercenaries, privately contracted police and paramilitaries. The hiring of armed security forces by the company to operate within oil palm concessions should be avoided as far as possible and, where absolutely necessary, must be subject to strict monitoring and third party supervision, to ensure that the hiring of these forces is legal and proportionate, and that their activities in no way infringe on human rights or the general wellbeing of local communities.

Tightening standards

Enhancement and tightening of the content, implementation, governance and capacity of standards such as the RSPO will be critical to ensuring respect for the rights of communities affected by the palm oil sector, and to securing the legitimacy

and accountability of these mechanisms. Resources, budgets and personnel need to be increased to allow for better monitoring of the activities of member companies, as well as the effectiveness of conflict resolution mechanisms, such as the Complaints Panel and the Dispute Settlement Facility (DSF). The same applies to the IFC Compliance/Advisor Ombudsmen (CAO), which, while worthy in intent and having established some important precedents, lacks the mandate and the capacity to remedy the huge numbers of disputes between companies and communities, and thus is in urgent need of reform and scaling up.

Given that to date, no complaint has been submitted to the RSPO by communities without the support and facilitation of non-governmental organisations (sometimes local or national and sometimes international as well), it is imperative that information on and access to RSPO mechanisms be provided to communities such that they are able to use these mechanisms independently and to effect. This is particularly important in the context of conflict, given that the jurisdiction of the RSPO remains ambiguous in cases of disputes over land and natural resources, and with regards to the rights of communities to accept or reject the RSPO as a dispute resolution mechanism.

The auditing process of the RSPO also needs to be improved through comprehensive training of auditors on both environmental and human rights elements, regular monitoring of RSPO auditors' activities, the development of a standardised format of auditing which does justice to the complexities and detail of grassroots realities, and the establishment of an escrow fund within the RSPO to ensure the objectivity and independence of auditing bodies. The duration of RSPO certification audits must be made sufficient to allow all communities within the concession to participate in the audit in a constructive and sufficiently detailed manner. Stricter standards for audit reporting should also be established to ensure that audits contain

sufficient information and evidence to support identified conformances and non-conformances to the RSPO P&C. Clearer requirements should be developed for audits to be shared with local communities prior to certification in forms and languages accessible to them, in order to cross-check information contained therein.

Standards such as the RSPO are based on principles of multi-stakeholder dialogue and the pursuit of mutually satisfactory outcomes, yet there is concern that, while laudable in theory, these principles are leading to a reluctance, or lack of ability on the part of the RSPO, to deal effectively and rigorously with companies that have been shown to violate the Code of Conduct and P&C on repeated occasions. Sanctioning mechanisms thus need to be clarified and enhanced to secure the credibility of the RSPO itself. Furthermore, the issue of conflicting interests and roles within the RSPO needs to be addressed, for instance, where an Executive Board member company is subject to a complaint through the Complaints Panel. Such situations have been shown to be a hindrance to the provision of remedy to affected parties and an obstacle to effective conflict resolution. In addition, criteria or guidance needs to be developed in relation to the obligations of RSPO member companies where concessions are sold to non-RSPO companies, particularly where conflicts and conflict resolution processes are still underway, either by the RSPO itself or other mechanisms.

Grievance and redress mechanisms should be developed by companies with the participation and inputs of local communities, and these should guarantee anonymity and the protection of complainants where requested. SOPs on social welfare, environment, conflict resolution, HCVs and others, should also be developed jointly by the company and the communities to create a sense of ownership of the process for communities as rights-holders. Where land conflicts are protracted and of a serious nature, a moratorium

should be imposed on development of palm oil operations within the concession in question pending mutual agreement of an acceptable conflict resolution mechanism. In all cases of conflict, evidence should be provided to demonstrate that all possible means of resolution have been introduced to, discussed with, and decided upon, with and by the local community in question. This includes formal legal procedures, Alternative Dispute Resolution, the RSPO, international human rights courts, and so forth.

In relation to the point above, stronger language in the P&C is critical concerning the importance not only of *processes* in place to resolve conflict (such as jointly agreed conflict resolution mechanisms or SOPs), but of the implementation and outcomes of these processes in practice, particularly where SOPs have been developed without the participation of local communities, or where local communities do not feel they have been given enough time or information to agree or disagree with the mechanism. Effective provisions must be set in place to ensure the anonymity of complainants and whistleblowers where requested in cases of conflict, to avoid subsequent harassment, intimidation or abuse. Companies should be responsible for keeping full and detailed records of past and ongoing complaints and conflicts within their concessions to help companies and communities identify recurrent causes of conflict and mitigate future conflicts.

Recognition of rights by governments

Where national laws and regulations fail to provide adequate recognition and protection to the rights of indigenous peoples and local communities, where international human rights instruments are poorly enforced, and where national and international legal frameworks are not harmonised, the ability of companies to abide by certification standards such as the RSPO is hindered, and their efforts towards sustainability requirements at times penalised rather

than encouraged as a result. Initiatives to revise national laws which are contrary to international human rights standards and the right to FPIC is also in the State's best interests, placing them in a better position to gain the benefits from investments, to avoid reputational risks of being found in breach of international human rights law, to avoid civil conflict and to avoid investors choosing instead to invest in other countries where they feel their investments are more secure.

As such, the effective implementation of certification standards that require respect for both systems of law requires legal harmonisation, the ratification of all relevant international human rights instruments by States, and the domestication of these laws into national regulations. Beyond ratification and domestication is the need for more effective and independently monitored implementation and enforcement of such laws, including in particular the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, the UN Protect, Respect and Remedy Framework, as well as the United Nations Declaration on the Rights of Indigenous Peoples. Wherever possible, local national laws should be interpreted to fit international law, where the national can bear this interpretation. For example, some laws can be interpreted as providing minimum standards, such that it would not place the company in breach of the national law to improve on those minimum standards, and thus comply with international law and RSPO P&C.

The RSPO and oil palm companies themselves can play a pivotal role in pushing for legal reform by engaging with national governments to revise laws and regulations so that RSPO members can respect the rights of communities to their customary lands and to FPIC. Companies should also support relevant government bodies and officials in accessing information and training to better accommodate the RSPO approach. This training should extend from

the level of central ministries, through the provincial and district authorities down to the village level. Planning agencies also need guidance on how to incorporate HCV zoning and consideration of community land rights into land use and economic planning processes. Concession contracts

should themselves be compliant with the RSPO P&C and international law. Contracts with the government must not give companies a *carte blanche* to take land without terms and conditions that comply with these international laws and standards, such as respecting the right to FPIC.

Designing and putting into practice a full and effective process to respect the right of indigenous peoples and local communities to FPIC in relationship to oil palm plantation development is not an easy task. It requires significant commitments of time, material and human resources, and is often far beyond what is required under national law. It requires wide and iterative participation of all key stakeholders and rights-holders. It requires thinking about what consent means, who gives it, who represents the interests of the communities, and how it can be verified. Most importantly, it requires on the part of companies a recognition that even where a comprehensive process has been undertaken, before signing an agreement, communities still have the right to say ‘no’ to oil palm development on their lands. Independent monitoring and robust verification by third parties remains critical to ascertaining the degree to which community decisions are being respected on the ground. Failing to respect the rights of local communities to the full extent of their lands and to FPIC is the root cause of protracted and at times violent conflict between and within communities, with companies and with the State. Such conflicts present serious risks to the communities, but also to plantation companies, investors and to the RSPO itself.

The findings of these studies expose the gulf that exists between the law and the RSPO standard and point to the urgent need for governance and legal reforms to adequately protect community rights from expropriation and provide just remedies for abuses. Equally critical are development processes achieved through legal, policy and governance reforms to protect indigenous peoples’ and farmers’ land rights, prevent ‘land grabs’, ensure fair processes of negotiation over land, build community capacity and ensure mechanisms for the resolution of land conflicts. Full supply chain traceability is needed in which environmental protections are matched with comprehensive protections of human rights. Such accountability should equally apply to investors. Widespread and effective compliance with the RSPO standard depends on respect for human rights, good governance, transparency, accountability, rule of law and access to justice. While the RSPO standard itself needs to be strengthened and enforced, so long as national laws and policies allocate lands to companies without respect for community rights, company compliance will be hard to achieve and further conflict inevitable.

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Endnotes

1. A similar issue became apparent in a neighbouring concession (PT Agro Nusa Investama (Sambas) being developed by the Wilmar Group, but early intervention by NGOs led to remedial actions being undertaken by the company.
2. RSPO 2012, 2013.
3. CERD 2007.
4. Chao 2013.
5. Krishnan 2012.
6. RSPO (nd), 2010.
7. Colchester 2012.
8. Parker 2012.
9. World Bank 2011.
10. FAO 2012.
11. RSPO 2007a; FPP 2008.
12. Colchester & Lumuru 2005.
13. RSPO 2007b.
14. In Indonesia a regency is a local level of government below that of province. It is headed by a 'regent', or *Bupati* in Indonesian.
15. Colchester *et al.* 2008, 2011.
16. EIA Telapak 2011; Butler 2011.
17. Hadiz 2011; DTE 2011.
18. Linklater 2012: 169-175.
19. Ibid: 171.
20. See FPP 2013.
21. FPP with Profundo 2008.

Glossary

Accountability: The acknowledgement and assumption of responsibility for actions, decisions and policies within the scope of the role of the individual or institution in question, and encompassing the obligation to report, explain and be answerable for resulting consequences.

Cadastre: A comprehensive register of the geographic boundaries of an area or region. A cadastre commonly includes details of the ownership, the tenure, the precise location, the relief and area, the cultivations if rural, and the value of individual parcels of land.

Customary land rights: Rights in land that derive from traditional ownership, occupation or other use in accordance with customary laws and customary practices. These rights may be wholly, partly or not recognised in national laws but are recognised for indigenous peoples in international law.

Customary land: Land which is owned, or otherwise used, often on a collective basis, by indigenous peoples or local communities and administered in accordance with their customs and norms.

Elite capture: The seizing of resources intended for the benefit of a wider community or group by a few, usually politically and/or economically powerful groups or individuals, at the expense of the less economically and/or politically influential members of the group.

Engineered consent: Term used to describe consent that is given on the basis of partial and biased information and as a result of manipulation, intimidation or coercion by the party seeking the consent or other entities involved.

Formal rights: Formal rights exist where rights-holders derive their rights from statutory law, by legal precedent under common law systems, by regulation, by decision of the courts and by legal contracts with owners. In countries where custom is given the force of law by ratified international treaties, by national constitutions and/or by statutory laws and ordinances, customary rights may also be considered formal rights.

Free, Prior and Informed Consent: The right of indigenous peoples to give or withhold their consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use, as expressed through their own chosen representatives, based on a full sharing of relevant information, made without coercion or manipulation, and prior to the planned activities going ahead. Free, Prior and Informed Consent is a key principle in international law and jurisprudence related to indigenous peoples.

Governance: The processes by which citizens participate in decision-making, how government is accountable to its citizens and how society obliges its members to observe its rules and laws. Governance is concerned with the ways in which society is managed and how competing priorities and interests of different groups are reconciled. It includes the formal institutions of government but also informal arrangements.

Grievance mechanism: A structured (and typically non-judicial) process that addresses disputes or grievances that arise between two or more parties engaged in business, legal, or societal relationships. Grievance mechanisms may incorporate conflict resolution, mediation and negotiation. Where such mechanisms are transparent, credible and fair, they offer a reliable way for affected stakeholders to voice and resolve concerns related to development projects, while providing companies with transparent, effective ways to address community concerns.

High Conservation Value Area: Areas which are of outstanding significance or critical importance due to their high environmental, socioeconomic, biodiversity or landscape values. These areas need to be appropriately managed in order to maintain or enhance those identified values through pre-development assessments and ongoing monitoring. While some High Conservation Value Areas refer primarily to the natural values of species, landscapes and ecosystems, others refer to social values in terms of environmental services, basic needs and cultural identity of affected local communities.

Indigenous peoples: Although there is no universal definition for indigenous peoples, the concept as understood by modern international organisations and legal experts includes priority in time with respect to the occupation and use of a specific territory; the voluntary

perpetuation of cultural distinctiveness; self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and an experience of subjugation, exclusion or discrimination, whether or not these conditions persist.

Informal rights: Rights held by land users or owners without formal State recognition. Such rights may be recognised through custom, as well as by a very wide range of informal arrangements between land users and land owners, and through unilateral occupation and use of land. A large part of State lands and forests are in fact subject to informal rights that in many countries are not recognised or even acknowledged by the State.

Land acquisition: The process of acquiring rights to use land. Land acquisition may involve outright purchase (ie obtaining freehold title), obtaining permits, concessions and leases in accordance with statutory laws, or negotiating leases (and lease-lease-backs) with customary owners or through negotiated payment of rent for land use. Except in some cases of outright purchase, land acquisitions are normally conditioned and have defined and limited terms which must be observed by the operator.

Land grabbing: A growing trend in the Global South in the past decade, land grabbing is the acquisition (by purchase of lease) of vast amounts of land for agricultural production by foreign investors, of scale that is disproportionate in size in comparison to average land holdings in the region. Land grabbing is sometimes called ‘(trans)national commercial land transactions’ as this term pertains to both transnational and domestic deals, and underscores the commercial nature of the transactions regardless of scale and output markets.

Land rights: Any rights in land held by any person or entity. Such rights in land may be very varied and range from full, private ownership of alienable and inheritable freeholds through communal tenures, to seasonal use rights, and to limited rights of use access and transit. Rights may include rights to own, control, occupy, manage, use, farm, access, use resources, graze, benefit from, sell, inherit, mortgage, transfer, lease or rent.

Land tenure: The relationship, whether legally or customarily defined, among people,

as individuals or groups, with respect to land. Rules of tenure define how rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints.

Leasehold: Real property held by a tenant (lessee) under a lease for a fixed term, usually with conditions written in a lease, after which it returns to the freehold owners (the lessor).

Legal pluralism: The existence of multiple coexisting and overlapping legal systems within the same geographic area. These may include, but are not restricted to, customary, national, regional, international and religious legal systems.

Legal representation: The act or instance of standing for or acting on behalf of another, such as where a competent legal professional acts on an individual’s behalf within the court system.

Legitimate dispute: Any dispute in which an affected individual, incorporated body or group asserts that their rights, interests or negotiated agreements have been violated either previously or by the operator or a State agency that has permitted the operation. These may include but are not limited to disputes about: the extent of rights and acquisitions; overlapping claims; contested permits; persons or groups with identifiable claims who assert their rights were ignored in negotiations; lack of compliance with agreements; and negative impacts which were not adequately explained in negotiations.

New Planting Procedure: A new procedure (2010) of the RSPO to ensure that members who expand their plantations do so responsibly and do not clear primary forests or HCVAs, or take over lands without consent. The New Planting Procedure (NPP) requires RSPO members to post information on the RSPO website about their plans to open up new plantations, along with a summary of how they have done their high conservation value assessment, impact studies and the process they are using to secure lands. Under the procedure companies must allow 30 days to receive comments on their plans and they must delay planting if complainants have evidence that they are in violation of RSPO requirements under Principle 7 on ‘new plantings’.

Participatory mapping: The preparation of maps with the full participation and control of local rights-holders and land users. Often made using geomatic technologies (eg Global Positioning Systems) and specialist software (Global Information Systems), such maps are especially valuable in areas where government maps are imprecise, land cadastres are weak or incomplete, there are many overlapping rights, claims and systems of land use and/or many land users have informal rights or access to land. Participation refers not only to the collection of information for the cartography, but also to the process of map-making based on field data (selection of legend, symbols and representation etc), the verification of map accuracy and validity by the communities and control of the subsequent use of the maps by the communities.

Plasma scheme: A cooperative programme of plantation development which involves main plantation companies called nucleus (*inti*) and individual farmers called plasma farmers. The scheme was first conceived as part of the Indonesian government's transmigration programme in the 1980s and designed to assist smallholders to become independent plantation growers. In theory, in the early years of plantation development before plantations reach maturity, the livelihood of smallholders are supported through employment by the company and at the same time learning how to cultivate oil palm. The two main types of plasma schemes in Indonesia are PIR Trans and KKPA. Under PIR Trans, plasma farmers are required to sell their FFB to the *inti* for a period until their loan is repaid. In the case of KKPA, the *inti* manages the plantation and deducts fees for the works undertaken from the FFB sale proceeds. Under both schemes, the *inti* purchases the FFB from the plasma farmers.

Remedy: The manner in which a right is enforced or satisfied by a court when some harm or injury, recognised by society as a wrongful act, is inflicted upon an individual. Under international law, violation of a human right gives rise to a right of reparation for the victim(s). In human rights law, the availability of effective remedies is a right in and of itself that complements other recognised rights. Remedies include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Roundtable on Sustainable Palm Oil

(RSPO): A not-for-profit association that unites stakeholders from seven sectors of the palm oil industry (oil palm producers, palm

oil processors or traders, consumer goods manufacturers, retailers, banks and investors, environmental or nature conservation NGOs and social or development NGOs) to develop and implement global standards for sustainable palm oil. The RSPO aims to divert the palm oil frontier away from primary forests and areas of high conservation value and it proscribes land-grabbing, insisting that all lands must only be acquired with respect for the customary rights of local communities and indigenous peoples, including respect for their right to give or withhold consent to land purchases or leases.

Self-determination: A fundamental right of all peoples that underpins the work of the United Nations. In relation to indigenous peoples in particular, this right is stipulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Article 3 whereby indigenous peoples have the right to 'freely determine their political status and freely pursue their economic, social and cultural development' and Article 4 whereby 'indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.'

Shifting cultivation: An agricultural land use system, found in many parts of Africa and Asia, in which a tract of land is cultivated until its fertility diminishes, when it is abandoned until this is restored naturally. Shifting cultivation frequently involves slash-and-burn agriculture whereby an area is cleared for temporary cultivation by cutting and burning the vegetation.

Smallholder: Farmers growing oil palm, sometimes along with subsistence production of other crops, where the family provides the majority of labour and the farm provides the principal source of income and where the planted area of oil palm is usually below 50 hectares in size.

Sosialisasi: Frequently used by companies operating in Indonesia and Indonesian government bodies, the term *sosialisasi*, which has the normal meaning of 'being friendly', is used as a technical term to mean 'awareness raising' or 'public dissemination of information'. It implies a one way transfer of information from the developer to those to be developed, informing communities and other stakeholders of the projected development.

The term is used throughout the studies carried out in Indonesia to make clear the differences between this process and the process required to fully and adequately respect the right to FPIC, which differs from the requirements, nature and expected outcomes of *sosialisasi*.

Stakeholder: Any group or individual who has a stake or interest in a particular development and will be affected either negatively or positively by it. Stakeholders can include relevant government agencies, private sector entities, indigenous peoples and local communities.

Voluntary standard: Specifications developed, usually through multi-stakeholder processes, that define the principles and criteria that govern the production and processing methods for a particular product. Most mechanisms are based on third party certification, which monitors compliance with the principles and criteria, as well as product traceability. The purpose of voluntary standards is to improve the social, environmental and economic sustainability of commodity production, sourcing and manufacturing through the promotion of global requirements, criteria and principles.

About the authors

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Marcus Colchester is English and received his doctorate in Social Anthropology from the University of Oxford. He is former Director of and current Senior Policy Advisor to the Forest Peoples Programme. Marcus has over 30 years' experience working with forest peoples in the humid tropics. His expertise is in indigenous peoples, social and political ecology, standard setting, human rights, environment, development land tenure, policy reform and advocacy, FPIC and conflict resolution. He has served on several committees of the Roundtable on Sustainable Palm Oil. Marcus has worked intensively on logging, plantations, palm oil, extractive industries, dams, colonisation and protected areas.

Sophie Marie Hélène Chao



Born in 1987, Sophie Chao is French and Chinese. She received her BA in Oriental Studies and her MSc in Social Anthropology from the University of Oxford. After working as a teacher in rural Tibet, and as consultant at the Education Sector of UNESCO Headquarters in Paris, Sophie became Assistant to the Director of the Forest Peoples Programme in 2011. Her fieldwork, research and advocacy are on the oil palm sector and RSPO standards, international human rights jurisdiction, and agri-business and human rights with a regional focus on Indonesia. She co-edited the sixth volume of this series on the social implications of oil palm expansion. Sophie is currently pursuing an LLM in Law at the Open University, UK.

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Christopher Fon Achobang holds a Masters Degree in Translation and is researching for a PhD in Applied Linguistics. He has served in various industries and as consultant for environmental issues and translates in his free time. Christopher has done consultancy work for international NGOs interested on the Nguti and Mundemb areas where Herakles Farms is planning expansion. Achobang's interests have led him to identify problems with the environmental and social policies of large companies such as Sogea-Satom, Cameroon Development Corporation (CDC) and Hysacam with respect to 'with respect

Afrizal



Afrizal is a senior lecturer at the Department of Sociology at the Faculty of Social and Political Sciences, Andalas University in Padang, West Sumatra. He received his doctorate in Agrarian Conflict from the Asian Studies Department, Flinders University. He works with a number of non-government organisations and has published on agrarian conflict and agrarian movements including the regulation and the resolution of agrarian conflict in Indonesia. His publications include: *Sosiologi konflik agraria: protes-protes agraria dalam masyarakat Indonesia kontemporer* (2006) and *The Nagari community, business and the State: the origin and the process of contemporary agrarian protest in West Sumatra* (2007). His current research interests include oil palm plantation conflict management and the use of mediation in oil palm plantation conflict resolution.

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Patrick Anderson works with the Forest Peoples Programme as a Policy Advisor, based in Indonesia. He advises on and assists with liaison with local NGOs, government, donors and research institutions. Patrick is a Steering Committee member of the World Rainforest Movement, and the Rainforest Information Centre, Australia. As well carrying out consultancy work for DfID and other aid agencies, in recent years he has acted as adviser to WALHI, WWF-Indonesia, Greenpeace Southeast Asia and AMAN. He is an active member of Samdhana

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Alfred Lahai Brownell is Senior Campaigner and founder of the Association of Environmental Lawyers of Liberia (Green Advocates), based in Monrovia. Alfred holds a B.Sc in General Agriculture and a JD/LL.B in Law from the University of Liberia, as well as an LL.M in Environment & Energy Law from the University of Tulane Law School, New Orleans. Green Advocates under Alfred has promoted national policies that would stem corruption and abuses related to natural resource extraction. Alfred presently represents local civil society on

the Liberian VPA forest law enforcement, governance and trade (FLEGT) Steering Committee, and the Liberian Extractive Industries Transparency Initiative (EITI) Multistakeholder Steering Group and has co-authored the Liberia EITI legislation. Extending his campaign into the Mano River Union Countries, Alfred has worked with several civil society organisations in Sierra Leone, Guinea and Ivory Coast to set up the Mano River Union Natural Resources Governance Platform.

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Fandy Ahmad Chalifah was born in Lamongan, East Java, in 1985. He graduated from Islam Darul Ulum University with a degree in Political Sciences. Throughout his university days, Fandy was an active member of the National Student Front (Front Mahasiswa Nasional) for which he acted as managerial coordinator of the Lamongan branch. Fandy currently works for WALHI Central Kalimantan and is expected to be promoted shortly to the position of Advocacy and Campaigns Manager.

Intan Cinditiara



Born in 1988, Intan Cinditiara (Olla) holds a Masters of Science (M.Si) in Gender Studies from the University of Indonesia and received her undergraduate degree in Political Science (International Relations) from Parahyangan Catholic University, Bandung, Indonesia. Olla's latest research looks at the initiatives of peasant women in protecting food security in an oil palm plantation in Krayan Bahagia village, Paser district, East Kalimantan. Her specialisations are gender issues, international relations, NGO projects and managerial work, media engagement, stakeholder engagement, public relations and social research. While working with Sawit Watch, Olla was also involved in a number of Working Groups of the RSPO. She is currently working with the Ministry of Trade of Indonesian on stakeholder engagement projects.

Asep Yunan Firdaus



Former director of HuMa (2011) and Semarang Legal Aid Foundation (2005), Asep Yunan Firdaus has been a legal advisor since 1998 and holds a litigation license since 2002. He is an expert on Natural Resources/Agrarian Law, Civil/Criminal Law, Procedural Law, Law-Making Procedures, Legislation and the system of law in Indonesia. He also has experience in voluntary legal service for the poor over the last fourteen years and has been conducting legal research on contemporary legal problems in Indonesia.

Nurul Firmansyah



Born in Jakarta in 1980, Nurul Firmansyah received his BA from the Faculty of Law (International Law) from Andalas University, Padang, West Sumatra, Indonesia. He is Director of Padang-Based NGO, Qbar Association. As a lawyer, Nurul also provides legal consultancy advice, Alternative Dispute Resolution (ADR) and litigation for communities in cases of dispute over agrarian and natural resources. Nurul is a public speaker, facilitator and researcher on land tenure and community-based natural resource management. He is also involved in local regulation drafting in relation to natural resources such as land, forests and indigenous peoples rights'. Nurul Firmansyah is currently pursuing an MSc in Integrated Natural Resources Management Studies, University of Andalas.

Emmanuel Freudenthal



Emmanuel Freudenthal BBus (Hons) (UTS), MPhil (Oxon) wrote this article in his personal capacity and as a Project Officer at the Forest Peoples Programme. He is currently an interim Program Officer for Justice and Human Rights at the European Union Delegation to Cameroon. Over the past years he has been working with forest-dependent peoples to assert their rights in Cameroon, Central African Republic and Kenya as well as in global policies.

Edy Subahani (Oeban Hadjo)



Edy Subahani (Oeban Hadjo) was born in Pahandut, Palangkaraya, Central Kalimantan. A graduate of the Law Faculty of PGRI University, Palangkaraya. He was member of Green Rescue (Nature Lover Group) in Palangkaraya and volunteer at Yayasan Tahanjungan Tarung (YTT) in 1999-2001. Oeban Hadjo was elected to the Regional Council of WALHI Central Kalimantan in 2002-2005. He is also active as a speaker and facilitator on issues related to the environment, conservation and social issues at the national and international level. Oeban Hadjo is expected to serve as Managing Director in Kelompok Kerja Sistem Hutan Kerakyataan (POKKER SHK) or Community Based Forest Management (CBFM) and of Information Services on Participatory Mapping Services in Central Kalimantan (SLP2KT).

Fatilda Hasibuan

Fatilda Hasibuan works at the Impact Adaptation and Initiatives Department of Sawit Watch. She graduated from the Law Faculty of North Sumatra University. From 2001 to 2008, Fatilda was actively involved with Perhimpunan Lentera Rakyat, a non-governmental organisation that advocates for the rights of plantation workers, farmers and communities living near or within plantations in Labuhan Batu district, North Sumatra. Fatilda is also active in the Public Interest Lawyers Network (PIL-NET).

Hermawansyah

Born in Sungai Bakau Kecil, West Borneo in 1975, Hermawansyah is a former student activist and his work focuses on issues of empowerment and advocacy. He is a founder of Lembaga Gemawan (1999) and is an active Board Member. He is the initiator of and is actively involved in various local and national NGO networks. Besides being a consultant for Kontak Rakyat Borneo and Gemawan, he is also a speaker, facilitator and trainer in issues of good governance, policy advocacy, political education and citizenship, paralegals, natural resource policy, community organisation and village autonomy. At present, Hermawansyah works at the Swandiri Institute.

Thomas Jalong

Thomas Jalong is Director of Pusat Informasi dan Komunikasi Komuniti (Community Communication and Information Center) based in Miri, which provides training, research and documentation on issues affecting indigenous communities in Sarawak. Thomas is the current President of Jaringan Orang Asal SeMalaysia (JOAS) or Indigenous Peoples' Network of Malaysia, a national umbrella organisation which is made up of more than 60 community-based organisations from throughout Malaysia that advocates for the promotion and protection of indigenous peoples' rights in Malaysia and at the regional and international level.

Norman Jiwan

Norman Jiwan was born in 1977 in Mabah village, Sanggau District. He is from the Dayak Kerambai/Keramay (Bidayuh) tribe of West Kalimantan. Norman trained in pedagogy and education at the Faculty of English at Tanjungpura University, Pontianak, West Kalimantan. Norman represents Sawit Watch at the Roundtable on Sustainable Palm Oil (RSPO) Criteria Working Group (CWG), Certification Working Group (VWG), Task Force on Smallholders (STF), Indonesia National Interpretation Working Group (INANIWG), and Smallholders Task Force Indonesia (STF Indonesia). He joined Sawit Watch in 2004 and in November 2008, he became a member of the Executive Board of the Roundtable on Sustainable Palm Oil (RSPO) representing Sawit Watch. Since April 2013 Norman joined Transformasi untuk Keadilan Indonesia (TuK INDONESIA), an Indonesian NGO based in Jakarta that works on the environmental, natural resource and human rights impacts of development in Indonesia. Norman Jiwan is Executive Director of TuK INDONESIA for the period of 2013-2016.

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Justin Kenrick is Africa Policy Advisor at the Forest Peoples Programme. He has a degree in social anthropology from Cambridge University, began working in Central Africa in 1989 to help secure forest peoples' rights, and received a PhD from Edinburgh University in 1996. He worked with FPP from 1998 until 2001 when he took a break from fieldwork and instead took up a lectureship at Glasgow University while being on FPP's Board. He returned to working for FPP in 2011. He and his family currently live on the Isle of Eigg, Scotland, taking a break from their work in the Transition movement in Portobello, Edinburgh.

Andi Kiki

Andi Kiki was born in Banjarmasin, South Kalimantan in 1976. He studied socio-politics at the University of Palangkaraya (UNPAR) and has been involved in activism and participative spatial planning since 2000 through local NGO Yayasan Tahanjungan Tarung (YTT), Central Kalimantan. In 2003, Andi became Executive Director of YTT and member of Sawit Watch. In 2005, he became Regional Coordinator for Kalimantan at Pakat Borneo and Secretary of the Multi-stakeholder Palm Oil Working Group in 2006. In 2007 – 2008, Andi worked as a consultant for international donor Kemitraan, and is now Project Officer for the Programme Management Unit of Kemitraan in Central Kalimantan.

Emilola Kleden

Emilola Kleden was born 1965 in Flores, a small island in the central part of Indonesia. A graduate of the Physics Department of Gadjah Mada University (Yogyakarta), his main interest is working with rural communities. Emil joined AMAN, a nation-wide indigenous organisation promoting the rights of indigenous peoples in Indonesia, from 1999 to 2007, and has worked as a Field Officer for the Forest Peoples Programme since 2007. Emil works on human rights and indigenous movements in Indonesia, focusing particularly on the development and implementation of the principle of Free, Prior and Informed Consent for the last seven years in various areas in Indonesia.

**Tawangatri Kusumohartono**

Born in 1986, Tawangatri (Ratri) Kusumohartono is Indonesian. She graduated from Universitas Indonesia with a BA in Social Science. She started her career as an intern for the United Nations Information Centre in Jakarta. Afterwards, she worked for LEAD Indonesia as Communication Officer, an organisation focused on promoting sustainable development. She is currently working for Sawit Watch as Communication Officer specialising in conflict resolution. Her fieldwork involves advocacy, communication strategy, media engagement and supporting affected communities in capacity-building.

**Tom Lomax**

Tom Lomax is a lawyer in the Forest Peoples Programme's Legal and Human Rights team with experience working on indigenous and tribal peoples' rights and forest governance issues in Africa, South America and Scandinavia. His academic background is in Physics, Philosophy, Law and Legal Practice. Tom's previous legal experience includes bringing human rights and public law cases in the UK jurisdiction, including work on claims in the Court of Appeal and Supreme Court. His work at the Forest Peoples Programme focuses on using the international human rights law framework and legal and policy reform processes to support forest peoples in securing their rights to their lands and natural resources.

**Agustinus Karlo Lumban Raja**

Born in Medan on 8th August 1983, Agustinus Karlo Lumban Raja holds a degree in Law from the Law Faculty of Atma Jaya University, Yogyakarta and is completing his specialisation in Advocacy at Islam Indonesia University, Yogyakarta. Karlo currently works at Sawit Watch as staff of the Advocacy, Policy and Legal Defence Department, with a focus on Social and Environmental Risk Mitigation, in collaboration with the Public Interest Lawyers Network (PIL-NET). He has been involved in a number of studies and research, including in relation to the macro-effects of bio-fuels, oil palm plantations in Papua, the RSPO Principles and Criteria, and support for local communities in cases of conflict with oil palm companies.



Thapat Maneerat

Thapat Maneerat has been working on the issue of indigenous peoples and climate change since 2007. He has long-standing experience of the struggle of indigenous peoples including the Manni people, and is an advocate of their human rights.

Jean-Marie Muanda

Born on 6th April 1965, Jean-Marie Muanda worked in education prior to joining the Congolese Associative Movement. In June 2000, he founded Actions pour les Droits, l'Environnement et la Vie (ADEV), an NGO involved in environment and human rights issues in the province of Bas-Congo in DRC. Jean-Marie holds a degree in History, and long-standing experience in fieldwork with local communities affected by natural resource exploitation. As a defender of human rights, Jean-Marie is Coordinator of ADEV, the Focal Point of Réseau Ressources Naturelles (RRN) in the province of Bas-Congo, and President of the Administrative Committee of LCDP / MBONGI Bas-Congo. Jean-Marie is married with three children.

Arthur Neame

Arthur Neame has worked in the Philippines for nearly 25 years. His primary work has been with NGOs specialising in rural and urban poverty issues with particular emphasis on local governance. He is currently an associate of the Socio-Pastoral Institute in the Philippines where he works on community-based Disaster Risk Reduction and with programs employing interfaith dialogues to engage with local governments. In 2011 Arthur lead a research cluster on the practice of Free Prior Informed Consent in the Central Philippines as part of a study on REDD+ implementation in the Philippines. He formerly managed the program of Christian Aid (UK) for the Philippines, China and Cambodia.

Samuel Nguiffo

Samuel Nguiffo studied Law and Political Science in Cameroon. He is the founder and current Director of the Center for Environment and Development, an NGO headquartered in Cameroon and active in the Congo Basin on issues related to natural resources management and communities' rights. He was awarded the 1999 Goldman Environmental Prize for Africa.

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Kittisak Rattanakrajangsri is a Mien from the north of Thailand. He has worked with indigenous communities and organisations since 1989. Kittisak is currently the Executive Director of the Indigenous Peoples' Foundation for Education and Environment, an indigenous peoples' organisation based in Chiang Mai, Thailand.

Y.L. Franky Samperante



Y.L. Franky Samperante is Director of Indonesian NGO PUSAKA, whose work focuses on developing and strengthening the capacity of communities and community organisations in fighting for change to protect, recognise and respect their lands and forests, as well as the sustainable management of natural resources. Franky and his team work with communities in and around the forests in Aceh, Central Kalimantan, Central Sulawesi and Papua, where communities are threatened by large-scale food and energy development projects, logging, oil palm plantations, conservation schemes and REDD+. Franky holds a Bachelor in Economic Development from Tadulako University, Palu, Central Sulawesi, where he graduated in 1997. He was also Program Manager at the National Secretariat of AMAN from 2004 to 2006. Franky is Program Manager and Advisory Board Member at Yayasan Tanah Merdeka, Palu, Central Sulawesi, since 2001.

Brendan Schwartz



Brendan Schwartz is the Extractive Industries Programme Manager at RELUFA—the Network for the Fight Against Hunger in Cameroon. Brendan has conducted research on the socio-economic impacts of the Chad-Cameroon Pipeline, sub-national natural resource revenue management, land-use planning, and palm oil development in Cameroon. Brendan holds a Bachelor's degree in International Relations from Connecticut College.

Messe Venant



Messe Venant is a Baka of Cameroon. Born in 1970 in Andom, East Cameroon, he received his education at the Minkolong public school and the Lycée classique de Bertoua. Messe has extensive field experience working for non-governmental organisations in the self-promotion of the Baka peoples, and is involved with the Pan-African Institute for the Development of Central Africa in Douala (IPD-AC). Since 2008, Messe works as Project Coordinator at Forest Peoples Programme and as member of Association OKANI, an NGO that works to support the rights of Cameroon's indigenous Baka peoples.

Stéphanie Vig



Stéphanie Vig is currently working as a lawyer with the Forest Peoples Programme. She has a civil law degree from the Université de Montréal as well as a Magister Juris and a Master of Philosophy in Law from the University of Oxford. Stéphanie has worked with the Special Rapporteur on the Rights of Women of the African Commission on Human and Peoples' Rights, for the Canadian Bar Association, as well as for the United Nations Development Fund for Women. She also served as law clerk to the Honourable Louise Charron of the Supreme Court of Canada. She is a member of the Quebec Bar.

Portia Villarante



Portia Villarante has been working with indigenous peoples in the Philippines for the past seven years. She is Project Coordinator at Anthropology Watch, an NGO composed of anthropologists and other social scientists assisting indigenous communities in the Philippines on tenurial security through the conducting of research, capacity building, participatory community mapping and GIS, networking and advocacy. She has also done research on fishing, aquaculture and poor urban communities in the past. Portia holds a BA degree in Anthropology and a Master in Community Development from the University of the Philippines.

Isal Wardhana

Isal (Ical) Wardhana was born in Balikpapan, East Kalimantan in 1980. He received his BA in 2003 from the Forestry Faculty of Mulawarman University, Samarinda. Isal worked at the East Kalimantan (WALHI Kaltim) branch of Friends of The Earth (FoE) Indonesia as Deputy Director in 2006 and Executive Director since 2007. Isal carries out forest analysis for community-based forest management, environmental analysis and also fieldwork investigations and facilitation. The focus of his work is advocacy in relation to monoculture, mining and forestry. In 2005, Isal acted as a member of the Indonesian Civil Society Delegation on Forest Law Enforcement Government and Trade in four European countries, as well as the Sawit Watch delegation to the RSPO in Singapore.

Antonius Priyani Widjaya

Antonius Priyani Widjaya was born in 1976 in Rawak, West Kalimantan. He graduated with a degree in Forest Management from the Faculty of Forestry of Tanjungpura University, West Kalimantan, in 1999. Antonius has worked as Coordinator of the NGO's Alliance for Peace Building and Reconciliation in West Kalimantan and Program Manager for Peacebuilding and Transformation at Institut Dayakologi. In 2006, he was a Founding Team Member of the Aliansi Masyarakat Adat Dayak Jalai Kendawangan in Ketapang District. Antonius is Executive Director of WALHI West Kalimantan since 2011.

Wong Meng Chuo

A Sarawakian living in Sibu, Wong Meng Chuo holds a Masters in Ministry degree (Trinity Theological College, Singapore 1978) and an MSc in Environmental Management (Imperial College, University of London 2000). A former pastor and current lay preacher of the Methodist Church of Sarawak, Wong Meng Chuo became an NGO worker and social activist in 1982. Much of his work has been to promote the welfare and rights of the indigenous peoples of Sarawak. Wong Meng Chuo has also acted as researcher cum lecturer at the community college of New Era in Kajang, Peninsular Malaysia. He is also a columnist of several local Chinese media. Currently, Wong Meng Chuo runs the community support organisation, Institute for Development of Alternative Living (IDEAL), and serves as a social and environmental consultant.

About the partners



Forest Peoples Programme (FPP)

FPP works with forest peoples in South America, Africa, and Asia, to help them secure their rights, build up their own organisations and negotiate with governments and companies as to how economic development and

conservation are best achieved on their lands. The vision of the organisation is that forests be owned and controlled by forest peoples in ways that ensure sustainable livelihoods, equity and well-being based on respect for their rights, knowledge, cultures and identities. FPP has also done extensive work in Southeast Asia on legal pluralism and the opportunities and challenges experienced by indigenous peoples and local communities as a result of plural legal regimes. In addition, FPP is also engaged in research, advocacy and fieldwork related to oil palm expansion in Southeast Asia and its socio-cultural, economic and environmental impacts. For more information please visit www.forestpeoples.org.



Sawit Watch

Sawit Watch was set up in 1998 and since then, has built a network of over 130 members and local contacts working with dozens of local communities in Sumatra, Kalimantan and Sulawesi. The mandate of Sawit Watch is to support local communities who have lost their forests and livelihoods due to large-scale oil palm expansion, and to support those in forestlands who continue to resist this development. Through this mandate, Sawit Watch works towards the conservation and restoration of Indonesia's forests and promoting the best deals possible for those communities who choose to live within oil palm plantations. In addition to community

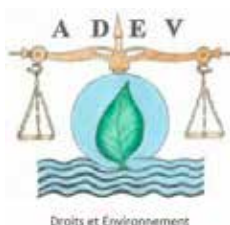
awareness raising activities, they are involved in assisting communities secure their land rights and sustain their traditional community (*adat*) laws. Sawit Watch also assists communities in developing or maintaining economically, socially and ecologically sustainable land and forest management. For more information please visit www.sawitwatch.or.id.



Transformasi untuk Keadilan INDONESIA

Transformasi untuk Keadilan Indonesia (TuK INDONESIA) is an Indonesian NGO based in Jakarta that works on the environmental, natural resource and human rights impacts of development in Indonesia. TUK

INDONESIA advocates for the fulfilment of the constitutional rights of the Indonesian people for the realisation of justice, well-being and human integrity. Its mission is to empower Indonesian CSOs and communities through capacity-building and education; to promote recognition, protection, fulfilment and respect for human rights; to strengthen cultural values and local wisdoms in natural resources management and environmental protection and management and; to advocate for the sustainable management of natural resources and the environment.



Actions pour les Droits, l'Environnement et la Vie (ADEV)

ADEV is a not-for-profit and non-governmental environmental and human rights organisation, established in January 2000. The organisation is based in the town of Boma in the Democratic Republic of Congo (DRC), and works throughout the country's Bas-Congo province. The organisation's mission is to promote sustainable development based on the protection of the environment and the respect of human rights. As its vision, ADEV believes in a world where all humans can fully enjoy their rights and

where the earth is no longer considered as simply merchandise. The objectives of ADEV are: to promote environmental protection and the responsible management of natural resources (forests, land, water, minerals, hydrocarbon) with a view towards sustainable development; to promote and defend human rights, particularly economic, social and cultural rights for social justice; to monitor exploitation activities of natural resources by enterprises and other agents; and to promote good governance and the effective participation of women in development processes.



Anthrowatch

Anthropology Watch, Inc., or AnthroWatch, was founded by a group of Anthropology graduate students of the University of the Philippines Diliman, with the purpose of bridging a perceived gap between the academic focus of education and the practice of development anthropology through actual engagement in development work. With this beginning, the organisation shares the common vision of sustainable, self-managed communities, especially IP communities in the Philippines, which have secure ancestral domains. Its mission is to work toward this vision by conducting research, Geographic Information System (GIS), mapping, training and advocacy through processes that are participatory, gender-fair, culturally appropriate and ecologically sound.



Centre pour l'Environnement et le Développement (CED)

CED is an independent and non-political organisation founded in 1994. The organisation was created as a reaction to the forest management crisis in Cameroon in the early 1990s, during which the country saw a large increase in industrial logging, illegal development and exploitation of forests, illegal poaching, and ecological, social and economic problems caused by this accentuation of commercial pressure on the forest. CED's mission is to contribute to the protection of the rights, interests, culture and aspirations of indigenous and local forest communities in Central Africa, whilst promoting environmental justice and the sustainable management of natural resources in the region. For more information please visit www.cedcameroun.org.



Climate and Land Use Alliance (CLUA)

The Climate and Land Use Alliance is a collaborative initiative of the ClimateWorks Foundation, David and Lucile Packard Foundation, Ford Foundation, and Gordon and Betty Moore Foundation. The Alliance seeks to catalyse the potential of forested and agricultural landscapes to mitigate climate change, benefit people, and protect the environment. The Alliance's strategy recognises that the global response to climate change will be unsuccessful without significant reductions in deforestation and forest degradation and improved agricultural practices, and that to meaningfully reduce deforestation and enhance the ability of land to store carbon, the forces that drive agricultural practices and expansion into forested areas must be addressed, including the growing global demand for food, fuel and fiber. The Alliance's strategy also recognises that protecting and enhancing the livelihoods and rights of indigenous peoples and rural communities is an essential part of the solution. For more information please visit <http://www.climateandlandusealliance.org/en/about-us-en/>.



Ford Foundation

Ford Foundation is an independent, nonprofit, nongovernmental organisation whose goals are to strengthen democratic values; to reduce poverty and injustice; to promote international cooperation and; to advance human achievement. Ford Foundation encourages initiatives by those living and working closest to where problems are located to promote collaboration among the nonprofit, government and business sectors and to ensure participation by men and women from diverse communities and all levels of society. The Foundation works mainly by making grants or loans that build knowledge and strengthen organisations and networks. For more information please visit www.fordfoundation.org.



Friends of the Earth Indonesia (WALHI Indonesia)

Wahana Lingkungan Hidup Indonesia (Indonesian Forum for the Environment) was founded in 1980 and joined Friends of the Earth International in 1989. WALHI is the largest and oldest environmental advocacy NGO in Indonesia. WALHI unites more than 450 NGOs throughout Indonesia's vast archipelago, with independent offices and grassroots constituencies located in 24 of the nation's 31 provinces. WALHI works on a wide range of issues, including conflict over access to natural resources, indigenous rights, marginalisation of communities, pollution, deforestation, climate change, and biodiversity conservation. For more information please visit <http://www.walhi.or.id/en.html>.



Gemawan Institute

Gemawan Institute is an NGO in West Kalimantan, Indonesia, established since 1999 and focusing on empowering local communities and developing advocacy towards social justice. Gemawan assists local communities at the grass-roots level (villages), especially local farmers and women, to develop their livelihoods. They have assisted more than 1,000 women to increase their capacity to fight for their rights, and for the last ten years, Gemawan has been developing two credit unions to empower communities in the Regencies of Sambas, Kubu Raya and Pontianak. Furthermore, in their advocacy efforts, Gemawan has been assisting local communities affected by oil palm plantation expansion to fight for their rights. Gemawan is also actively involved in working with partners (such as Sawit Watch and Forest People Programme) and providing input to the International Finance Corporation's (IFC) investment policy strategy for the palm oil sector. For more information please visit www.gemawan.org.



Green Advocates

The Association of Environmental Lawyers of Liberia (Green Advocates) is Liberia's first and only public interest environmental law organisation dedicated to protecting the environment through: advancing human rights protection and advocacy through sound environmental practices, giving voice to rural, indigenous, and tribal peoples, advocating for strong environmental laws, working to enforce existing laws, and empowering citizens to participate in environmental decision-making. The vision of Green Advocates is to help build a sustainable future for Liberia. For more information please visit www.greenadvocates.org.



HuMa (Association for Community and Ecology-Based Law Reform)

HuMa is a non-profit non-governmental organisation whose work focuses on the issue of law reform in the natural resources sector. The concept of law reform proposed by HuMa emphasises the importance of recognition of indigenous peoples' and local communities' rights to natural resources and preservation of ecology. HuMa believes that the law reform process must place indigenous peoples and local communities as its main actors. In accordance with our vision and mission, HuMa's ultimate goal is to push for reform to legal systems and practices, to enable them to deliver justice to marginalised communities and to support ecological preservation with respect for the values of humanity and social-cultural diversity. For more information please visit www.huma.or.id.



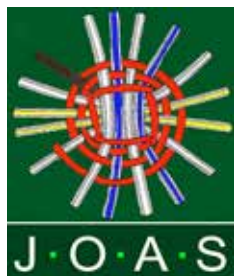
Indigenous Peoples' Foundation for Education and Environment (IPF)

The Indigenous Peoples' Foundation for Education and Environment (IPF) was officially established on 3 November 2005 in Thailand, registration number Chor Mor. 0027/2548, by a joint effort of indigenous peoples' leaders and local academics. Its main aim at that time was to build capacity of indigenous peoples and to promote full and effective participation of indigenous peoples in a wide range of international policy processes relevant to them. These included, but were not limited to, policy on forest and biodiversity conservation and management, and policy on climate change mitigation and adaptation measures. These activities were undertaken in close collaboration with the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests (IAITPTF) and other partner organisations. In 2009, the IPF reviewed and adjusted its policy and programmes to be more community oriented in order to best serve the need of its target communities particularly on issues of indigenous peoples' education, self-determined development and customary land use and natural resource management. The IPF is currently working with indigenous peoples in Thailand, such as Karen, Hmong, Mien, Lisu, Lahu and Akha. Experiences gained from indigenous peoples in Thailand will be shared and replicated to other indigenous groups in the Greater Mekong Sub-region (GMS), such as Laos, Cambodia, and Vietnam. For more information please visit www.ipf.or.th.



Institute for Development of Alternative Living (IDEAL)

The Institute for Development of Alternative Living (IDEAL) is a local non-profit oriented organisation based in Sibu Sarawak, Malaysia. IDEAL offers social and environmental consultant work for NGOs and communities, particularly on issues affecting indigenous peoples' customary rights.



Jaringan Orang Asal SeMalaysia (JOAS) - The Indigenous Peoples Network of Malaysia

The Indigenous Peoples Network of Malaysia or Jaringan Orang Asal SeMalaysia (JOAS) is the umbrella network for 21 community-based non-governmental organisations that have indigenous peoples' issues as the focus. As the focal point for indigenous rights and advocacy in Malaysia, JOAS provides the indigenous communities with representation not just nationally but regionally and internationally as well. For more information please visit <http://orangasal.blogspot.fr/>.



OKANI

Created in 2004, OKANI is a community-based indigenous NGO located in the East Region of Cameroon in Africa. It is staffed by a small team and governed by a committee of Baka peoples. OKANI works to secure the rights and promote sustainable livelihoods of indigenous communities in the forests of Cameroon and works in support of their collective bodies known as the Council of Elders. OKANI has extensive experience in advocating for indigenous peoples' rights and managing community-based projects, including income generation, self-determined development and land use mapping and participatory video. OKANI works on several issues in Cameroon, including protected areas, food security at the local level, access to land and education. OKANI's vision is to support the Baka peoples and ensure that they can work for their personal interest and self-determination.



PUSAKA

PUSAKA is a non-profit organisation focusing on: research, advocacy and the documentation and promotion of indigenous peoples' rights; capacity development; education on and empowerment of indigenous peoples' rights, including the right to land, and economic, social and cultural rights, and; strengthening community organisations. The vision of Pusaka is to effect policy changes which acknowledge and protect the existence and rights of indigenous peoples and poor communities, based on justice and democracy, using gender perspectives and promoting sustainable environments. Its mission is to improve capacity and policy and advocacy knowledge of communities and their organisations to assist their struggle for the fulfilment of human rights and to participate in determining development policies. For more information please visit <http://pusaka.or.id/profil>.



REseau de LUtte contre la FAim (RELUFA)

The REseau de LUtte contre la FAim (RELUFA) is a non-partisan national network of Cameroonian ecumenical and secular non-profit organisations and mainstream churches. The member organisations come from all regions in Cameroon and have joined forces to develop common strategies against systemic problems of hunger, poverty, and socio-, economic- and environmental injustice. Since 2001 RELUFA enjoys legal status under Cameroonian law. For more information please visit <http://www.relufa.org/home.htm>.



Rights and Resources Initiative (RRI)

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organisations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally. The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalisation by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights

and Resources Group, a non-profit organisation based in Washington, D.C. For more information please visit www.rightsandresources.org.



Setara Jambi

Setara Jambi is a non-governmental organisation established in response to concerns over ecological destruction, the exclusion of local and indigenous communities as well as palm farmers from natural resource management and the expansion of large-scale palm plantations threatening not only forests but also the lives of local communities. The decline in forest area and cover, the deprivation of local communities' rights by plantation companies and the marginalisation of small-scale palm farmers in the

palm industry chain bring Setara to undertake advocacy work against three pillars of change: community, State and market. The expectations of the organisation's partners such as palm farmers (smallholders and independent farmers) and of indigenous and local communities for an organisation focusing on improving these peoples' well-being and fostering change in plantation policies laid a strong basis for the creation of Setara, an organisation working on both advocacy and empowerment. For more information please visit <http://setarajambi.org/>.

Conflict or Consent?

The palm oil sector at a crossroads

Growing global demand for palm oil is fuelling the large-scale expansion of oil palm plantations across Southeast Asia and Africa. Concerns about the environmental and social impacts of the conversion of vast tracts of land to monocrop plantations led in 2004 to the establishment of the Roundtable on Sustainable Palm Oil (RSPO), which encourages oil palm expansion in ways that do not destroy high conservation values or cause social conflict. Numerous international agencies have also called for reforms of national frameworks to secure communities' rights and to develop sound land governance.

In line with international law, the RSPO's Principles and Criteria require member companies to respect the collective right of indigenous peoples and other local communities to give or withhold their consent prior to the development of oil palm on the lands they own, inhabit and use. Are companies keeping their promises? This edited volume of 16 detailed independent case studies including two updates, from seven countries in Asia and Africa carried out by a consortium of NGOs, addresses this question.

The studies reveal that the RSPO process has in some cases led to improved understanding, by communities and companies, of how to achieve 'sustainable development'. In addition, procedural improvements can be pointed to that may provide a basis for resolving some land conflicts. Overall, however, many oil palm companies are not respecting customary land rights, are acquiring lands without consent, are violating or avoiding compliance with national laws or court rulings and are in obvious violation of the RSPO standard.

The gulf between national laws and the RSPO standard highlights the urgent need to reform governance and national laws to adequately protect communities' lands from expropriation and provide just remedies for abuse of rights. Indigenous peoples and local farmers must be protected from 'land grabs', and their right to exercise Free, Prior and Informed Consent over the sale of any land must be respected. Full supply-chain traceability is needed to ensure that environmental protections are matched with comprehensive protections of human rights. Such accountability should also apply to investors.

The RSPO standard needs to be strengthened and enforced, but as long as national laws and policies allocate lands to companies without respect for community rights, company compliance will be hard to achieve and further conflict remains inevitable.

