

Land is Life

Land Rights and Oil Palm Development in Sarawak



Marcus Colchester, Wee Aik Pang,
Wong Meng Chuo and Thomas Jalong

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Cover photo: Community of Sungai Bawan protest against SLDB.
Credit: Wong Meng Chuo

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Our community has lived in this area for many decades and we had cultivated the land with padi, fruit trees and some cash crops including oil palm on a small scale. But now, we are told that we have no rights and we were even ordered to stop using and cultivating our lands. If the government has acquired our lands and given it to the company, why are we not informed or notified and compensated accordingly? Our lands and properties are taken behind our back and issued to others. This is sheer robbery. The government and our leaders should be protecting our rights to our lands and not simply giving it to others without informing and consulting us. Some people are allowed to thrive but some are left to be deprived. We have engaged a lawyer to defend us and to apply for the order to be set aside.

*Tua Rumah, Jupiter Anak Segaran, Iban Village Chief,
Rumah Jupiter, Sungai Gelasa, Lembong, Suai, Sarawak*

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I am very concerned about this development because it affects my people's livelihood. I do not agree with this type of development and the manner it is conducted. The development of plantations in this area will definitely result in the destruction and loss of the resources on our lands which we depend on for our survival. The company should recognise our existence here. Our people were born here, brought up and nurtured in this area and we want to continue to live on this land and surrounding forests.

*Alung Ju, Penan Village Chief of Long Singu,
Peliran, Belaga District, Kapit Division, Sarawak*

1. Executive Summary

Sarawak is the largest State of the Federation on Malaysia and is located on the island of Borneo. It is experiencing a rapid expansion of oil palm plantations which have led to growing conflicts with the indigenous peoples. The Malaysian Constitution gives jurisdiction over land to constituent States and in Sarawak this has led to the emergence of a political elite, whose power rests on the exploitation of natural resources and which has dominated the political economy for the past 30 years.

Although the rugged and forested interior of Sarawak is mainly populated by indigenous peoples, referred to locally as ‘natives’ and Dayaks, who comprise the largest ethnic grouping in the country, these peoples have relatively little access to political power. Under customary law, the majority of the interior of Borneo is owned and controlled by community groups and complex customary laws regulate who and how lands are owned, regulated and transferred.

Malaysia has a plural legal regime, meaning that it accepts the simultaneous operation of distinct bodies of law, and custom is upheld under the Federal Constitution. Native authorities and courts are officially recognised in Sarawak and continue to administer community affairs and deliver local justice, meaning that custom is a living and active source of rights in Sarawak, both in law and in practice.

However, since the colonial period and progressively thereafter, through a series of laws and regulations, the Government of Sarawak has sought to limit the exercise of ‘Native Customary Rights’ in land, freezing their extension without permit and interpreting them as weakly secure use rights on State lands. Moreover, although the Government admits that some 1.5 to 2.8 million hectares of land are subject to ‘Native Customary Rights’, it has not revealed where such lands are, meaning that most communities are unsure whether or what part of their lands are recognised under the Government’s limited interpretation of their rights.

Since natural resource-based development is a central plank of the Government's economic policy, disputes over land are common. In a series of cases in the higher courts in Sarawak and Malaysia, judges have upheld native peoples' land claims as consistent with the Malaysian Constitution and common law. These cases imply that the Government of Sarawak's restrictive interpretation of 'Native Customary Rights' is incorrect. Consistent with international human rights law, the courts have accepted that indigenous peoples' have rights in their lands on the basis of their customs and not as a result of grants by the State.

The palm oil sector in Malaysia is in a phase of rapid expansion, with exports expected to exceed M\$ 35 billion in 2007, now given further impetus by global demand for 'bio-fuels'. With land on the Peninsula now in short supply, much of the planned expansion of the sector will take place in Sarawak. Sarawak has been experimenting with oil palm plantations for 30 years but early State-run schemes were less successful. The Government is now encouraging private sector expansion including on 'Native Customary Lands' and plans to almost double the area under oil palms to 1 million hectares within the next three years, including planting on customary lands at a rate of 60,000 – 100,000 hectares per year.

Under the so-called *Konsep Baru*, the 'New Concept', native land owners are expected to surrender their lands to the State for 60 years to be developed as joint ventures with private companies, in which the State acts as Trustee on behalf of the customary owners. There is a lack of clarity about exactly how native landowners get benefits during these schemes and how they can reclaim their lands on the expiry of the lease.

Owing to conflicting interpretations of the extent of 'Native Customary Rights' and disputes about compensation, due process and promised benefits, there are now over 100 cases in the courts of Sarawak filed on behalf of indigenous plaintiffs relating to disputes over land, of which the study identified some 40 cases related to palm oil.

Detailed testimonies collected from 12 indigenous communities affected by oil palm revealed the following major problems:

- Conflicts and disputes over land
- Lack of respect for customary rights
- Absence of transparent communications and consultations
- Violation of the principle of Free, Prior and Informed Consent
- Denial of people's right to represent themselves through their own chosen representatives
- Limited or absent payments of compensation
- Lack of transparency and participation in Environmental Impact Assessments
- Inadequate mechanisms for the redress of grievances.

State promotion of the oil palm sector in Sarawak is at odds with the principles and criteria of the Roundtable on Sustainable Palm Oil (RSPO), a number of members of which have been identified to be operating in Sarawak.

Without legal and procedural reforms in Sarawak, wide-scale compliance with the RSPO standard seems unlikely. The current system harms community interests and may also discourage investment in such a risky and conflictual sector. The report recommends legal and procedural reforms, by both the Government and companies, to bring them into line with international law and industry best practice.

2. Land, People and Power in Sarawak

The Federation of Malaysia is comprised of thirteen states and three federal territories that are geographically spread over Peninsula Malaysia and the northern parts of the island of Borneo. Under the federal constitution, the separation of jurisdictions and powers are clarified. While issues such as national security, foreign policy and trade are matters for the Federal Government, the policies and laws concerning lands and forests are under the jurisdiction of the individual States. To accommodate local sensitivities, when Sabah and Sarawak were invited to join the Malaysian Federation in 1963, the two eastern states of Sabah and Sarawak were also given jurisdiction over their West Malaysian counterparts, for example in immigration, by which the two East Malaysian state governments technically still have full control over entry into the two states by West Malaysians.

However, through the Malaysian political system which has been characterised in practice by the dominance by one single coalition of ethnic-based parties since independence, and by means of the centralization of political powers in the hands of the Prime Minister, the federal government continues to exercise direct and indirect control over the states. The mere fact that the Prime Minister's consent is absolute over the appointment of state chief ministers in West Malaysia and increasingly in Sabah demonstrates the political influence of the federal over state governments. In addition, through annual budgetary and policy dictates, the federal government effectively exerts considerable control over matters which are in the realm of state governments.



Map of Malaysia¹

The whole of the Peninsula and the island of Borneo were once home to indigenous peoples, with unique languages, traditions, customs, culture and identities. *Adat*, or traditional governance systems, existed long before any foreigners set foot on their lands and they enshrine and ensure the rights of people over their lands and their usage of lands.

The advent of colonial rule and the subsequent creation of a new nation with statutory laws have long over-shadowed the traditional laws. When state-driven development was far and few, concentrated mostly in expanding urban centres, the conflicting laws were not very consequential. But when logging fast expanded into the indigenous peoples' territories, the might of the government proclaimed its dominance. Since then, expanding settlements, infrastructural advance, dams, agricultural schemes and so on have added to the encroachment onto indigenous communal lands. With primary rainforests making way for secondary forests and then mono-crop plantations of fast-growing trees, rubber

¹ Sourced from Sarawak Government Website at <http://www.sarawak.gov.my/content/view/5/10/>

and oil-palm, the conflict between the two bodies of law has become more evident, more visible and more blatant.

Physically, Sarawak is the largest state in the Federation of Malaysia. Its land area of some 124,449.51 square kilometres is about the size of the whole of Peninsula Malaysia with a land mass of 131,573 square kilometres. Sarawak is divided into eleven divisions, with Kuching as the capital of Sarawak. The other divisions are Sri Aman, Sibü, Miri, Limbang, Sarikei, Kapit, Kota Samarahan, Bintulu, Mukah and Betong. Kuching is the seat of government for Sarawak.

Sarawak is not famous for the richness of its soils and the suitability of its land for agriculture. Nearly 70% of the State is classified as ‘hilly’ and only 3.5 million hectares of the State is considered somewhat suitable for agriculture. Nevertheless, especially since the early 1990s, Sarawak has experienced a rapid and still continuing expansion of oil palm estates, which are the subject of this study.²

Table 1: Ethnic Composition of Sarawak

| Ethnic Groups | % popn. |
|---|----------------|
| Malay | 23.0 |
| Iban | 30.1 |
| Bidayuh | 8.3 |
| Melanau | 5.6 |
| Other natives (‘Orang Ulu’ – upriver peoples) | 5.9 |
| Chinese | 26.7 |
| Others | 0.4 |

Source: Jomo et al 2004:8

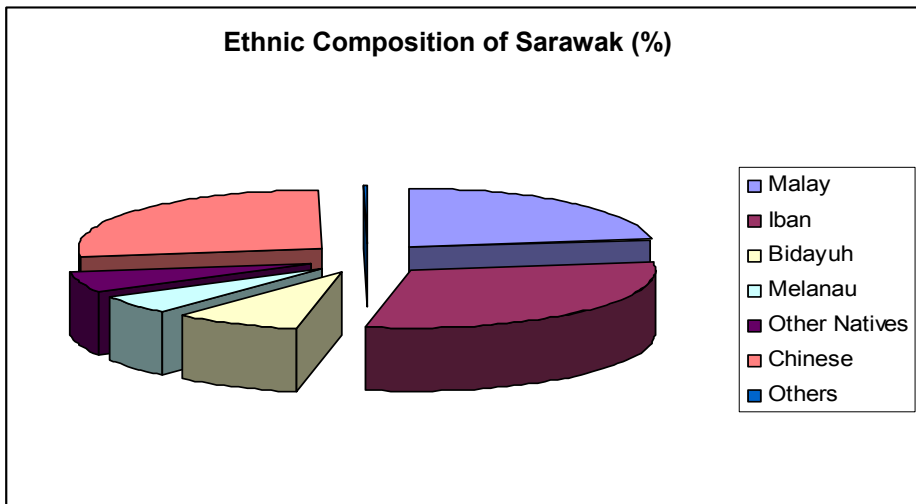
As at 2005, Sarawak had a population of 2.31 million people.³ Sarawak boasts a rich history of diverse peoples from when indigenous communities were spread all over the island of Borneo. Long before the existence of the British and Dutch colonial powers, which divided up the island, indigenous communities had

² Jomo et al. 2004:149-150.

³ Yearbook of Statistics, 2005, Department of Statistics, Malaysia

existed for generations, each with their respective customs, traditions, culture, languages and identities.

Officially, Sarawak now comprises some 40 ethnic groupings. The indigenous Dayak, a collective term used to group all indigenous communities, also known without any pejorative sense as ‘natives’ in Sarawak, still dominate the rural settings, even though increasing numbers spend more time in urban areas than in their rural homes.



Source: Based on Jomo et al. 2004:8

Although Sarawak has never experienced the kind of racial riots that broke out in the Peninsular in 1969, competition for power in Sarawak, as in the Peninsula, has for the most part cleaved along racial lines and has been heavily influenced by the politics of the Federal Parliament.⁴ Early attempts by Dayak to assert an independent line from the dominant authorities in the Peninsula were not tolerated and the first and only Dayak Chief Minister of Sarawak,

⁴ Leigh 1974; Searle 1983; Wong 1983; Colchester 1992.

Stephen Kalong Ningkan, was removed from office through the application of retrospective constitutional amendments in 1966.

Since that time, a Muslim-Melanau elite has dominated power in Sarawak based on a patrimonial system for dispensing benefits, notably in land, forestry concessions, development contracts and infrastructure schemes, which has consistently found ways of winning over even politicians opposing the ruling coalition. The power of this elite has never been overtly challenged by the Federal authorities so long as they have remained steadfastly loyal to the National Front Coalition which, led by the United Malays National Organisation, has dominated the Federal Parliament since independence. The present Chief Minister of Sarawak, Taib Mahmud, has now been in power without interruption, though not without challenge,⁵ for more than 25 years.

The net result is that the Dayaks, who are the single most numerous social grouping and who predominate in rural areas, are relatively powerless in terms of national politics and decision-making about land. Such Dayak political parties as do exist have been co-opted into the national front coalition and no longer independently defend the rights of Dayak communities to their lands.

⁵ Yu 1987.

3. Land Tenure and the Law

The Dayak peoples of Sarawak, who comprise the most numerous section of Sarawak society and make up the majority of the peoples in the interior, have very long traditions of land occupation. They regulate their affairs according to ‘custom’ (*adat*), a body of beliefs, social norms, customary laws and traditional practices which is passed on from one generation to the next as oral tradition. Flexible and adaptive to change, *adat* also provides the charter underpinning Dayak notions of land ownership and control, regulating how land is shared out among community members, how it is inherited, how rights are created and forfeited and to whom and how rights can be transferred.

Although the details of land ownership vary greatly among the different Dayak peoples, a common pattern can be discerned. Each community is conceived as owning a territory, *menoa* in the Iban language. These village territories, have well-known boundaries, often agreed between neighbouring villages in meetings, that commonly run along rivers, up creeks to their headwaters and along watersheds and so back down and round to their starting point. The village territory is a communally owned area – it belongs to the community as a whole not to any one person – and includes the forests, rivers, creeks, streams and farmlands and other resources within it. The land is not just a geographical area; it is also a lived experience, and tales and legends, village histories and important events, link the land to the people in a profound way that gives people a sense of belonging to the land, just as the land belongs to them. Where boundaries between villages have been disputed or have needed clearer demarcation, they may be marked with cairns or blazed on trees, but for the most part the bounds are known and undisputed, being accepted by all around.

Within these communal territories, individuals and families acquire personal rights, subject to village consensus, by clearing forests, or opening up land, for farmlands. These areas then become individual or family owned areas where each family raises their crops and makes a living. Some farmlands on fertile soils, typically in the lower ground, are more-or-less permanent but most of the

upland farms require rotations if productivity is to be sustained. Rights in land are retained by individuals during forest fallows, when the farmlands are left to regenerate forest cover and recuperate their nutrient levels, before being cleared again for another round of farming. Forest fallows, *temuda* in Iban, are a vital part of the agricultural economy – a rational system for making a living off the poor soils that are common in the interior of Borneo. Quite complicated rules may also define who has first rights to extend their farmed areas and in which direction. Typically, an owner has first rights to extend their farm uphill away from the river, but not upstream along the river bank, so that access to river transport is shared and not monopolised by one or a few villagers. Some farms may be far from villages and crops will be looked after and protected from pests by people going to live in their distant farms for long periods. Small semi-permanent houses, *dampa* in Iban, are erected in these further flung farms to make these extended periods of work away from the longhouse comfortable.

All family or individually owned lands are heritable, with heirs being clearly defined by customary laws – norms of inheritance vary greatly among the different peoples. Rights in these lands are maintained so long as the persons or families continue to work the land or reside in the communities or remain nearby. To retain their rights in land, customary laws may require members to maintain their links with the community, for example by residing in the longhouse a minimum number of nights per year. Once they are considered to have abandoned their lands, these lands then revert to communal ownership and may be shared out to new families or other community members. The principle in play here is important. The underlying right to land is vested in the community, and individual or family rights over land earned by the inheritance, clearance, occupation and use are nested within that underlying right of the community. Customary rules thus regulate the way private or family lands may be transferred between owners. Again details vary greatly, but commonly it is not considered acceptable for lands to be sold to outsiders, although leases and temporary transfers may be permitted.⁶

These customary rights systems can be seen to have changed somewhat in the past sixty years. As populations have grown and relations with the market have

⁶ Richards 1961; Sandin 1980; Hong 1987; Colchester 1992.

deepened, village boundaries have been subdivided as new longhouses have split off from parent communities. In other cases, territories which used to embrace several longhouses are now more clearly defined around each settlement. With greater involvement in the cash economy, family and individual farms have expanded to include rubber plantations, cacao farms, pepper gardens and other crops grown for the market and not for immediate use. In some places, *menoa* lands without any personal ownership rights overlaying them may have virtually disappeared, as almost the whole of a community's territory has been parcelled up into personal rights areas. Land markets have begun to operate in some areas. While some see these transformations as evidence of the collapse of tradition, they are better seen as evidence of the vitality and adaptability of *adat*.

Custom, Land and Administration

Malaysia as a whole has a plural legal system – which is to say that several bodies of law are recognised as having validity in the country. Custom is recognised and upheld in the Constitution of the Malaysian Federation. The customary authorities of village headmen (*tua rumah*), regional chiefs (*penghulu*) and paramount chiefs (*pemancha*), are also recognised by the Sarawak Government and receive a small stipend for their services in maintaining the rule of law, both administrative and *adat*. As in Sabah, so in Sarawak a large proportion of daily affairs are left to *adat* and disputes are resolved in officially recognised 'native courts', which continue to adjudicate over village affairs including disputes over land within and between villages and even, on occasion, with outside parties.⁷ Custom is, thus, a living and active source of rights in Sarawak, not just in practice but also in law.

However, when it comes to the administration of land, since the colonial period Sarawak can be seen to have pursued a somewhat divergent approach. On the one hand, the State has respected custom, has upheld customary rights systems and has sought to protect native lands from exploitation by outsiders. On the other hand, the State has sought to limit customary rights in a number of ways.

⁷ Phelan 2003.

In the first place the State has sought to discourage shifting cultivation, which was seen as wasteful and environmentally imprudent and prejudicial to economic development. In the second place the State has sought to encourage Dayaks to settle into larger villages, develop permanent crops and engage in the market and give up their ‘nomadic’ way of life. In the third place, the State has declared large areas of ‘vacant’ or ‘idle’ lands, which may in fact be subject to customary rights, to be ‘Statelands’ (public lands without private or communal owners). In the fourth place, large areas especially of upland forests, have been declared Forest Reserves and Protected Areas and procedures have been unilaterally imposed and declared which have sought to limit or extinguish customary rights in these areas. Finally, as this report explores in more detail, the State has sought to take over extensive areas for plantations, by a variety of different means. All these strategies to limit the native peoples’ land rights have led to protests and generated conflict.⁸

To protect and order land matters, and to encourage a transition to a more ‘modern’ system of land use, the colonial State introduced a system for classifying lands into various categories.⁹ Mainly along the coast, ‘Mixed Zone Lands’, were designated in which land markets could freely operate, lands were held by private title and registers of land ownership were developed using the Torrens System of individual land ownership and cadastral surveys. Such lands could be held by any legal person in Sarawak, whether native or not. ‘Native Area Lands’, also mainly near the coast, were areas of native occupation where individual land titling was promoted but where land markets were restrained – non natives could not own land in such areas – in order to protect the natives from being taken advantage of by unscrupulous or more market-savvy buyers. ‘Native Communal Reserves’ were to be areas, which could be declared by the Government, regulated by customary law. ‘Native Customary Lands’ were areas where customary systems of land ownership prevail according to *adat* but subject to restrictive interpretations of ‘Native Customary Rights’, as explained below. A fifth catch-all category, ‘Interior Area Lands’ was designated over areas where rights and uses were yet to be clearly defined, while the final category, ‘Reserved Lands’, included all lands gazetted for special use such as

⁸ For a longer discussion see Hong 1987; Colchester 1992.

⁹ Land (Classification) Ordinance 1948.

forestry reserves, protected areas and so on. This system of land classification was retained in the post- colonial era and prevails today.

Most of the cases discussed in Chapters 5 and 6, below, concern areas which are disputed as falling into these various categories. While the natives may consider their areas to be 'Native Customary Lands', the government may hold them to be 'Interior Area Lands' which are by default assumed to be Statelands. Or, where the government may accept that these areas fall in the category of 'Native Customary Lands', it may be seeking to develop these lands as plantations through various forms of 'Land Consolidation and Rehabilitation' which may aim to convert the lands, in the longer term, from being 'Native Customary Lands' into 'Native Area Lands' under private title.

Customary Rights and the Land Code

During the century of the Brooke Raj (1840-1946), introduced laws were not very clear about land rights. While the Rajah made various declarations about his rights over the whole territory, which was progressively expanded from a small area around Kuching to encompass the present extent of the State, the rulers also declared their intent to protect the native peoples' rights. For the most part, District Officers allowed native authorities and native courts to resolve land disputes and only got involved when called in to help sort out more intractable problems. In adjudicating in the native courts, District Officers applied their understanding of *adat*, and they gradually built up records of the boundaries of the various communities under their jurisdiction, which were bound together in a volume kept in the district office and referred to as 'the Boundary Book'. Instructions from the Central Secretariat were sent out to officials on how they should determine the boundaries of all villages and these were to include not only farmed areas but also areas of natural forest necessary for expansion and wider livelihood needs.¹⁰ Though some of the Boundary Books were lost during the Second World War, they remained in use up until the 1950s and in the Baram area, at least, continued to be added to and referred

¹⁰ Eg Brooke Raj Secretariat Circular No 12/1939 cited at length in Colchester 1992:70-71.

to in the settlement of disputes into the 1970s. They have also been called in evidence in recent cases in the courts.

Sarawak was ceded to the British after the Second World War, and the Instrument of Cession included an important ‘savings clause’ which transferred the rights of the Rajah, the Rajah’s Council and the State and Government of Sarawak to the British Crown ‘but subject to existing private rights and native customary rights’.¹¹ However, under the British colonial administration (1946-1963) a series of laws was then introduced which sought to place a more restrictive interpretation on customary rights.¹² These laws were consolidated in the *1958 Land Code*, which remains, subject to various revisions, the main law ordering land matters in the State.

The Land Code provides a little more detail of how ‘Native Customary Reserves’, governed by customary law, should be established. These were to be considered to have been created on State land but have hardly been implemented. The Land Code also recognises ‘Native Customary Rights’ (NCR). According to Section 5(2) of the Land Code, NCR can be established by:

- The felling of virgin jungle and the occupation of the land thereby cleared
- The planting of land with fruits
- The occupation of cultivated land
- The use of land for a burial ground or shrine
- The use of land for rights of way; and
- Any other lawful method.

The legal assumptions underpinning the colonial laws on land are questionable. In the first place the laws neglect to mention, or deliberately ignore, the wider areas of territory, beyond farmlands etc, held under customary law, which were recognised in the ‘Boundary Books’ and in the adjudications of the Native Courts. Moreover, the 1958 Land Code and the previous 1948 Land

¹¹ Cited in Bulan 2006:47.

¹² Porter 1968.

Classification Ordinance, assumed that the colonial State has a proprietary right in the land and, while allowing for the establishment of ‘Native Customary Rights’ on Interior Area Land, treated these as licensed use rights on State lands.

Amendments have since been passed by the now independent State of Sarawak which seek to further limit these rights. A 1994 amendment empowers the minister in charge of land matters to extinguish native customary rights to land.¹³ In 1996, the burden of proof with respect to NCRs was placed on the native claimant against the presumption that the land belongs to the State. Then in 2000, the Land Code (Amendment) Ordinance removed the phrase ‘any other lawful method’ from Article 5.¹⁴ Other laws were also passed to limit native land claims. In 1987, it was made illegal for communities to block companies from having access to their logging and plantation enterprises even if these roads crossed areas claimed by natives as customary lands. Ten years later, in response to a successful court case upholding a community’s claim to Native Customary Rights, a law was also passed disqualifying communities from making their own maps of their customary lands for use in the courts.

The intent of the colonial and independent State of Sarawak to progressively limit and restrict NCRs is plain. The most contentious aspect of the laws, however, was a provision in the 1958 Land Code that froze all extension of native customary rights without permit after the 1st January 1958.¹⁵ Later, the Government issued instructions to district officials to cease giving out such permits. From the Government’s point of view, therefore, native communities do not enjoy NCRs if their farms were not established by 1958, unless they can show they have one of the rare permits that was issued since that date.

In sum, the laws relating to lands and NCRs have been progressively tightened by limiting the definition of NCRs and the procedures for establishing them; by

¹³ The fact that this provision was written into law argues that the State did recognise that, at least up until this time, native customary rights may indeed not have been extinguished (and see later).

¹⁴ The courts have however already ruled that this legal sleight of hand cannot be applied retrospectively

¹⁵ In fact the same restriction had been imposed from 1st January 1955 by the Land (Classification) (Amendment) Ordinance 1955.

facilitating their extinguishment; by giving the State sole power to decide on rates of compensation; by restricting the free movement of native peoples; and by increasing the penalties for failures to comply with State legislation.¹⁶

In different official documents and statements, the Government has variously admitted that between 1.5 million hectares and 2.8 million hectares of the territory of Sarawak is subject to Native Customary Rights. However, the location and extent of the areas that the government already accepts as being encumbered with NCRs has not been made public. Consequently most communities are unsure if the areas that they consider to be theirs by custom are recognised by the Government as areas of ‘Native Customary Rights’. In the face of this confusion, many native people thus refer to their customary lands as ‘Native Customary Rights’ or ‘Native Customary Rights Lands’, although these terms, as framed by Sarawak Land Code, have much more limited meanings.

Land Rights in the Courts

The very wide gap between customary rights as conceived by the native peoples and the ‘Native Customary Rights’ as interpreted by the Government with reference to the Land Code, has led to numerous land disputes many of which have been referred to the courts. Chapters 5 and 6 look into some of these cases as they relate to oil palm. Some of the key considerations and findings of the courts with respect to land in general are however summarised here.

In their adjudication of these land disputes in Sarawak and in the Federal Court in Kuala Lumpur, judges have not only taken into account the Land Code and other pieces of law relating to land in Sarawak but also the Constitution of Malaysia and other framing pieces of national and State law. As defined in the Interpretation Acts of 1957 and 1958, ‘Law’ in Malaysia ‘includes written law, the common law in so far it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or in any part thereof.’ Likewise, following the cession of Sarawak to the British in 1946, the Sarawak authorities passed the *Application of Law Ordinance 1949*, which

¹⁶ IDEAL 1999.

provided for the reception of English common law into Sarawak, ‘subject to such qualification as local circumstances and native customs render necessary’.¹⁷ Therefore, the courts in Sarawak as well as in Malaysia may take into account the findings of other courts that use English Common Law and adapt them to the realities and customary laws of Sarawak. They thus draw on a well-developed body of jurisprudence about native rights from countries as far afield as Nigeria, New Zealand, Australia, Canada and South Africa, as well as judgements given in the Privy Council in England.

The courts in Sarawak and Malaysia have thus delivered some important judgements based on these legal precedents, on their own understanding of customary law, the assertions of native people themselves and the pleadings of the lawyers acting on behalf of the native people. In the fully tried NCR land case in Sarawak, *Nor Ak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769, the trial Judge referred to *Mabo v State of Queensland* (1992) 66 ALJR 408 which was followed in a Malaysian case of *Adong bin Kuwau & 51 Ors v The Government of Johore* [1997] 1 MLJ 418. His Lordship said:

This journey through history is necessary because, and it is common ground - arising from the decision in *Mabo v State of Queensland* (1992) 66 ALJR 408 which was followed in *Adong bin Kuwau & 51 Ors v The Government of Johore* [1997] 1 MLJ 418 and which decision was affirmed by the Court of Appeal ([1998] 2 MLJ 158) - ***the common law respects the pre-existing rights under native law or custom*** though such rights may be taken away by clear and unambiguous words in a legislation. I am of the view that is true also of the position in Sarawak.

In *Adong bin Kuwau & 51 Ors v The Government of Johore* [1997], the learned Judge, after referring to the many cases in other jurisdictions that upheld native rights, concluded that ‘Aboriginal people’ have their rights over their ancestral land protected under common law. At page 430 of His Lordship’s judgment he said:

¹⁷ Cited in Bulan 2006:47.

My view is that, and I get support from the decision of Calder's Case and Mabo's Case, the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein **since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial.** I believe this is a **common law right** which the natives have and which the Canadian and Australian Courts have described as native titles and particularly the judgment of Judson J in the Calder's Case at page 156 where His Lordship said the rights and which rights include '... **the right to live on their land as their forefathers had lived** and that right has not been lawfully extinguished.....' **I would agree with this ratio and rule that in Malaysia the aborigines common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.**

Likewise in *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors [2005] 4 CLJ 169*, the learned President of the Malaysian Court of Appeal referred to *Adong* and His Lordship said: 'It is too late in the day for the Defendants to contend that our common law does not recognize aboriginal customary title'.

These findings are uncomfortable for the Government of Sarawak. The State Attorney General, who acts as legal counsel on behalf of the State Government in the many cases where it is a defendant, continues to argue for the colonial State's, and now independent government of Sarawak's, much more limited interpretation of 'Native Customary Rights'. He argues that written laws take precedence over the doctrines of common law and that the colonial power and now independent state, by reserving lands for other purposes have effectively

extinguished customary rights, except for those expressly recognised under State laws.¹⁸

The courts, however, continue to rule otherwise. The most recent judgement of the Malaysian Federal Court, in the case of *Madeli Salleh v Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697*, re-affirmed in October 2007 that the principle of common law applies in Sarawak, contrary to the arguments of the State Attorney General. This highest court in Malaysia affirmed that in Sarawak a communities' rights in land remain, even after the land has been reserved or gazetted by government order for another purpose. Since, in this case, the government had not expressly extinguished the prior owner's rights, nor paid due compensation for such as agreed by both parties, Native Customary Rights in the land endured.

Plantation Development and the Law

The implications of these and other judgements for land developers in Sarawak are manifold. On the one hand, it is clear that the native peoples' customary rights in land obtain independent of any act or grant of the State. They enjoyed these rights prior to the existence of the State of Sarawak and these rights endure today. Second, that these rights remain until and unless expressly surrendered or extinguished through an agreed legal process and payment of compensation. Third, that without such a process, investors and companies seeking to develop lands, for example for plantations in Sarawak, cannot assume that the area they are planning to develop is not encumbered with native customary rights. The mere issuance of a licence, lease or permit by the State Government to develop a plantation does not in law provide security against other claims on the land.

¹⁸ The Sarawak Attorney General's legal position has been made known to the Malaysian Human Rights Commission (SUHAKAM) (Attorney General 2007). A copy can be viewed at <http://www.rengah.c2o.org/assets/pdf/de0157a.pdf>. This position has been repudiated by a number of Sarawakian NGOs in a position paper available at <http://www.rengah.c2o.org/assets/pdf/de0162a.pdf>

These judgements also bring Sarawak into line with interpretations of indigenous peoples' rights under international law. As noted in Chapter 8, these norms of law are also accepted by the Roundtable on Sustainable Palm Oil, which promotes best practices based on international norms and standards. Unless plantation companies deal fairly with native peoples and respect their rights, their operations and investments are at risk.

4. The Palm Oil Sector in Malaysia

Large scale plantation development commenced in Peninsular Malaysia (Malaya as it then was) at the end of the 19th century. Already by 1925, nearly one million hectares of land had been cleared of forest and planted with rubber.¹⁹ Oil palm development came later, mostly after independence, when large-scale plantation development became a central plank in the national development policies. Since then, large scale plantation development for oil palm has almost closed the land frontier in the Peninsular.

By 2006, the export earnings of Malaysian palm oil industry scored a record of M \$ 31.8 billion,²⁰ while the production of crude palm oil increased by 6.1% to 15.9 million tonnes. The industry is targeting a harvest of 16.5 million tonnes in 2007. The total oil palm planted area has expanded to about 4.2 million hectares (compared with 2 million hectares in 2000), of which over 2.3 million hectares are found in Peninsular Malaysia and 1.24 million hectares in Sabah, while Sarawak has 600,000 hectares.²¹

Although Sabah and Sarawak have been slower to get going, the scarcity of available lands for further estates in the Peninsula, means that these two Bornean States are now the focus for plantation expansion and investment. The combined growth of Sabah and Sarawak in plantations development in 2006 was 4.5% compared to 1.6% in Peninsular Malaysia. The two Bornean States now hold a total planted area of about 1.83 million ha, accounting for 44% of the country's total oil palm plantation size.

¹⁹ Jomo et al. 2004:26.

²⁰ 2006 palm oil exports hit record M\$ 31.8 bn, *The New Straits Times – Business Times*, 11th January 2007, accessed online at

http://www.btimes.com.my/Current_News/BT/Thursday/Frontpage/BT338868.txt/Article/

²¹ Campaign to combat negative attitude towards palm oil, *The Star Online*, 25th June 2007, accessed online at

<http://www.thestar.com.my/news/story.asp?file=/2007/6/25/nation/20070625184355&sec=nation>

In terms of production, the two states produced a total of 6.91 million tonnes of crude palm oil in 2006, making up 43% of Malaysia's total production of 15.9 million tonnes.²² About 12.6% of the total 33.01 million hectares of land area of Malaysia are planted with oil palm trees, while Sarawak aims to double its present planted area to a million hectares by 2010, of which at least 400,000 hectares are to be taken from areas recognised by the government as being the native customary land.²³ Oil palm is planned to take up over 2/3rd of the 6 million hectares allocated for agricultural expansion between 2000 and 2010 as set by the Third National Agriculture Plan (NAP3). Further impetus to oil palm expansion is being given by international and national policies to develop palm oil as a 'biofuel'. The national biofuel policy officially sets targets for five strategic 'thrusts' for use of the fuel in transport, industry, technologies, exports and for a so-called 'cleaner environment'. By blending 5% processed palm oil with all diesels in the country, a new domestic market for 500,000 tonnes of palm oil per year will be created. This is equivalent to 40%-50% of the current national stock of palm oil.²⁴

²² Sabah, Sarawak positioned for growth, *The Star Online*, 3rd July 2007, accessed online on 3rd July at <http://biz.thestar.com.my/news/story.asp?file=/2007/7/3/business/18178105&sec=business>

²³ Ministry of Land Development Sarawak, available online at

http://www.mlds.sarawak.gov.my/background/b_1.htm

²⁴ Ministry of Plantation Industries and Commodities, 21 March 2006, in www.palmoil.com

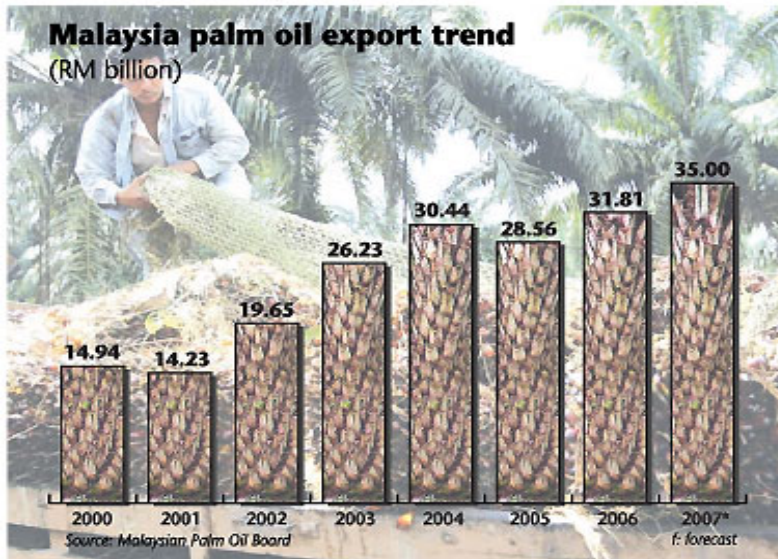


Figure 1: Malaysia's Palm Oil Export Trend (2001 – 2007)²⁵

The target set by EU for 5.75% bio-diesel in its fuel mix in 2010 and 10% by 2010²⁶ and from other countries²⁷ is also expect to boost exports of Malaysian palm oil, on top of its other larger traditional client countries.

China remained the top buyer of Malaysia's palm oil products last year, purchasing 3.58 million tonnes in 2006. The Netherlands was second, with 1.67 million tonnes. Pakistan was the third biggest buyer, consuming 957,352

²⁵ Sourced from "Palm oil exports poised to surpass RM35b this year", *New Straits Times - Business Times Online*, 27 July 2007, accessed on same publication day at http://www.btimes.com.my/Current_News/BT/Friday/Nation/35b.xml/Article/

²⁶ Sweden: EU must lift biofuel import tariffs, *The New Straits Times – Business Times*, 16th July 2007, accessed online at http://www.btimes.com.my/Current_News/BT/Monday/Nation/rup14a.xml/Article/

²⁷ Brazil government's mandate on the use of 2 per cent biodiesel (B2) content in diesel in 2008, as per "Brazil buying more M'sian palm oil", *New Straits Times - Business Times Online*, April 10 2007, accessed on 10 April 2007, at http://www.btimes.com.my/Current_News/BT/Tuesday/Frontpage/BT617039.txt/Article/

tonnes, while the US bought 683,650 tonnes. In 2005, demand from the US rose 65 per cent because of the US Government's mandatory labelling of transfat content on packaged food by January 1 2006.²⁸

In 2007, the Malaysian Palm Oil Board (MPOB) was quoted as saying that the top 10 buyers of Malaysian palm oil in the first six months of 2007 were China (1.6 million tonnes or 14% more than same period last year), the Netherlands, Pakistan (up 23 %), the US, Japan, India (11% more), Singapore, the United Arab Emirates, South Africa and South Korea.²⁹

Overall, the European Union bought 875,952 tonnes of palm oil in the first five months of 2007, 17 per cent less than in the same period last year.³⁰ The EU as a whole is an important market for Malaysian palm oil and related products, accounting for 17.9 per cent, or 2.58 million tonnes in 2007.³¹

With the environmental concerns such as global warming now globally accepted, a whole list of 'answers' has been propagated by industries globally. Top among the target areas is the fuel industry, and palm-oil has been pushed to the forefront as the 'answer' due to its position in the global oil market. With industrialized countries all rushing to set targets for reducing fossil fuel and where possible, to replace it with 'bio-fuel', the demand is anticipated to rise significantly.

All of this translates into substantial interest in the development of palm oil plantations in Sarawak. How does this fit with Sarawak's own development

²⁸ "2006 palm oil exports hit record RM31.8b", *New Straits Times - Business Times Online*, 11 January 2007, accessed on same publication day at

http://www.btimes.com.my/Current_News/BT/Thursday/Frontpage/BT338868.txt/Article/

²⁹ 'Palm oil exports poised to surpass RM35b this year', *New Straits Times - Business Times Online*, 27 July 2007, accessed on same publication day at

http://www.btimes.com.my/Current_News/BT/Friday/Nation/35b.xml/Article/

³⁰ 'Malaysian palm oil takes its battle to the air', *New Straits Times Online*, 23 June 2007, accessed on same day at

http://www.nst.com.my/Current_News/NST/Saturday/National/20070623095518/Article/index_html

³¹ 'Malaysia to allay fears in EU over oil palm cultivation', *New Straits Times - Business Times Online*, 4 June 2007, accessed on same publication day at

http://www.btimes.com.my/Current_News/BT/Monday/Nation/BT625654.txt/Article/

policies? Where is the land for these expansion plans? How does the law regulate access to such lands? Whose lands is it and what protections are there of the local communities' rights? What are peoples' own experiences of oil palm development in Sarawak? The following chapters explore some of the answers to these questions.

5. Sarawak Government Policies on Oil Palm Plantations

Since independence in 1963, successive governments in Sarawak have supported plantation schemes designed to promote ‘development’ and the more productive use of land. Many of the first schemes were with rubber and cacao. The first pilot scheme with oil palm was implemented in 1966. The crops and techniques may differ but the underlying policy has remained almost constant while the State has experimented with a series of initiatives to acquire land and capitalise estates in various different ways. The process began with State-owned enterprises on what were considered to be vacant State lands, then moved to State-led ventures on native customary lands, saw a third incarnation as the State’s promotion of private sector ventures on lands unencumbered by the State of prior rights and is now in its latest phase, the promotion of joint ventures between the private sector, native peoples and the State, in which the State holds native lands in fiduciary trust for development by private companies. None of these schemes has been without problems.

The first schemes

Between 1964 and 1974, land resettlement schemes in Sarawak were modelled on the integrated style of development which had been applied in Peninsular Malaysia by the Federal Land Development Authority (FELDA) since the mid-1950s. The early schemes in Sarawak were initially carried out by the State Agriculture Department, and from 1968 to 1972 they were executed by the Sarawak Development Finance Corporation. Later (1972 – 1980) these powers were transferred to a new statutory body, the Sarawak Land Development Board (SLDB), which was in turn corporatised in 1997 as Sarawak Plantation Sdn Bhd, and which became Sarawak Plantation Berhad in 2000.

As Bulan has explained, the early schemes involved clearing of new land and the relocation of natives into resettlement schemes dedicated to the planting of cash crops, including oil palms. However, although the idea was to develop waste lands, in fact participants in the schemes were often relocated into areas where there were already established traditional landowners, and this caused disagreements between scheme participants and the prior owners. To pay for their lands, land preparation, planting and initial crop care, the resettled farmers were burdened with debts that they were meant to repay out of their incomes from the crops. However, since these were dependent on the fluctuating prices paid in world commodity markets, as a result of the declining prices most were unable to make their repayments. The schemes also lacked the pool of workers and expertise required for their successful implementation and almost all were eventually abandoned due to management failures.³² Indeed some of the earliest schemes, such as the Skrang resettlement scheme were principally motivated by national security considerations and involved the obligatory relocation of Iban Dayaks from restive frontier areas to controlled villages.³³ As Jitab and Ritchie have noted 'such schemes were doomed from the start'.³⁴

Consolidating customary lands

Apparently learning from its mistakes and accepting the need to take into account customary systems of land tenure, in 1976 the State Government established the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) with the object of developing croplands directly within target communities' lands. SALCRA was conceived as a joint venture between the State represented by SALCRA and native farmers, in which the participating households supposedly retained their rights in land. To qualify, participants had to already hold suitable land in the proposed area of the scheme and, as owners,

³² Bulan 2006, citing King 1988:280 and Ngidang 2001.

³³ Low level unrest on the frontiers was caused by a number of factors including: President Sukarno of Indonesia's policy of *konfrontasi* with Malaysia; communist insurgency and; Sarawakian nationalist sentiments. Peoples such as the Iban, who had a history of expansionist warfare, were seen as a threat to the stability of the newly independent State and so were resettled (Colchester 1992:54-57).

³⁴ Jitab and Ritchie 1991:58.

they were meant to give full consent for the scheme, a condition not strictly followed when SALCRA developed plantations for displaced Iban flooded out by the ADB-funded Batang Ai hydro-electric project.³⁵

The functions of SALCRA included the consolidation and rehabilitation of land, and the provision of advisers and training facilities in various aspects of farming and land management. SALCRA had responsibility for the establishment and maintenance of estates, as well as organising, harvesting, processing and marketing produce during the whole life of the estates. The idea was that once scheme participants had acquired sufficient know-how to manage lands on their own, the estate could be divided up among the participating households, thus enabling them to obtain a demarcated piece of land to which they would be granted permanent title. However, in reality, this process of capacity building and then distribution of lands has not been carried through and most schemes continue to be dependent on government funding and administered directly by SALCRA. Land disputes in SALCRA areas have been a persistent problem.³⁶

Bringing in the private sector

The problems besetting these loss-making para-statal agencies, SLDB and SALCRA, led the government in 1981 to set up the Land Custody and Development Authority (LCDA) to promote development projects by the private sector. The ‘brainchild’ of the current Chief Minister, Taib Mahmud, the LCDA has the authority to acquire both state-controlled land and Native Customary Land for private estate development. It acts as an intermediary between landowners and corporations so that private investors can be invited to participate in land development subject to an allocation of shares in the relevant companies.³⁷ However, like the SLDB before it, the absence of large areas of suitable lands not encumbered with customary rights substantially slowed down the ability of LCDA to acquire and develop new palm oil estates. In 1991, it

³⁵ Colchester 1992: 59-62.

³⁶ Jitab and Ritchie 1991; Bulan 2006.

³⁷ Jitab and Ritchie 1991; Bulan 2006.

was estimated that of 2.8 million hectares of land well suited or marginally suited for agricultural development, only 300,000 hectares were vacant State lands, 2.5 million hectares being encumbered with native customary rights.³⁸ In 2006, these estimates were revised. The Ministry of Land Development, Sarawak now claims to have identified 3.9 million hectares suitable for oil palm cultivation of which only 1.5 million hectares are subject to native customary rights.³⁹

Although these schemes in Sarawak were initially modelled on the broadly successful land development programmes implemented by FELDA in the Peninsula, they were not well adapted to the realities of rural Sarawak. FELDA schemes on the Peninsula settle landless families on forested State lands, which are then cleared, typically for planting rubber and oil palm. In Sarawak, most lands are not vacant lands unencumbered of rights, most community members are far from landless, most practise diverse livelihood strategies and combine several economic options and most have much more limited experience with, and access to, markets. Moreover, estates require cheap labour to function profitably in a highly competitive world market, but in Sarawak local community members are reluctant to work for such low wages, especially when more lucrative jobs are available, such as in the logging camps.⁴⁰ Indeed most private sector oil palm estates in Malaysia depend on low paid migrant labour. With unencumbered State lands in short supply yet customary lands hard to manage, the government had to find a new way to gain access to native peoples' lands for plantations development

The 'New Concept'

In 1994, therefore, the Chief Minister announced a 'New Concept' (*Konsep Baru*) for the development of plantation lands, which brought together 'native customary rights landowners with their land and the private sector with their capital and expertise'. The new approach had the twin aims of, on the one hand, divesting the State of its financial risks in plantations development by

³⁸ Jitab and Ritchie 1991:66.

³⁹ Ministry of Land Development, nd.

⁴⁰ Jitab and Ritchie 1991:57-59.

encouraging direct investment by the private sector, while, on the other hand, providing a mechanism to acquire customary lands and make them securely available in large blocks of over 5,000 hectares so they were attractive to developers.

Under the *Konsep Baru* companies buy a 60% share in a joint venture, communities are allocated a 30% share in recognition of their contribution of lands, while the State acquires the remaining 10%. The State, by virtue of its fiduciary role and its responsibilities towards both investors and the communities, represented by a State agency such as the LCDA or Pelita, holds the communities' 30% stake in trust.⁴¹ The lands are then leased to the joint venture company for 60 years, being two full cycles of oil palm development.⁴²

Why should the State take on the role of Trustee over the communities' land? According to the Ministry for Land Development which is tasked with implementing the *Konsep Baru*, this arrangement is favoured because it 'will give absolute right to the implementing company to manage the plantation WITHOUT interference from the NCR landowners over a period of 60 years'.⁴³ During those 60 years, the landowners' interest in the plantation is represented entirely by the State agency that acts as Trustee for the native people.

Participating farmers thus have no direct voice in the management of the schemes but can expect to be paid the equivalent of about M\$ 1,200 for each hectare of land surrendered to the scheme, although of this amount 60% is used to acquire shares in the joint venture and another 30% is held onto by the Trustee and invested in Government Unit trusts, while only 10% - about M\$120 (approx. US\$33) - is paid in cash to the landowner. No compensation is payable for any existing crops, fruit trees or improvements on the land, but participating landowners can later expect to be paid an annual shareholder dividend

⁴¹ In the words of the Ministry of Land Development's website: 'In order to facilitate the formation of such joint-ventures and to safeguard the interests of both the landowners and the investor, the State Government will appoint its agency such as LCDA as Trustee to manage the interests of the landowners', Ministry of Land Development nd.

⁴² Majid Cooke 2002, 2006; Bulan 2006; Ministry of Land Development nd.

⁴³ Ministry of Land Development, nd, pdf on website titled 'Issues and Responses' page 1, emphasis in original.

proportional to the amount of land they contributed to the scheme in the first place, from which may be subtracted any costs incurred if the total value of the lands surrendered is calculated to be less than the value of the communities' 30% equity in the company.⁴⁴

Responsibility for dealings with the local communities in setting up these projects is given to the Ministry of Land Development, currently led by a Dayak Minister, James Masing. The Ministry has been tasked with the goal of building up a 'land bank' of 1 million hectares including at least 400,000 hectares of native customary lands to be acquired at a rate of at least 60,000 hectares per year.⁴⁵ According to the Ministry, the objective is:

To promote the commercial development of the idle and underutilized NCR land and the orderly development of state land into oil palm plantations in order to create employment opportunities in the rural areas and thereby ensuring (sic.) sustainable source of income in the rural areas. Ultimately, land development, particularly the NCR land development, should raise the standard of living of the rural people and contribute towards poverty eradication, reduce rural-urban migration and result in a balanced development between the rural and the urban areas.⁴⁶

With buoyant prices for Crude Palm Oil on the international markets, boosted in recent months by speculation in biofuels, the *Konsep Baru* has been successful in attracting private sector investment into the oil palm sector in Sarawak. Whereas in 1991, the great majority of palm oil estates in Sarawak were owned or controlled by para-statals, by 2002 only some 17% of plantations were State-controlled, the rest being held by private companies.⁴⁷ By the end of 2005, the Ministry of Land Development announced that under the *Konsep Baru* approach

⁴⁴ Ministry of Land Development, nd, pdf on website titled 'Issues and Responses' pages 3-4. It is not clear how land values are calculated given the absence of markets in land in most NCR areas.

⁴⁵ Recently it was reported that in order to achieve the target of 1 million hectares by 2010, the State government is now committed to planting oil palm on at least 100,000 hectares per year, *Borneo Post*, August 8th, 2007, page. 8.

⁴⁶ Ministry of Land Development nd.

⁴⁷ Majid Cooke 2002.

there were already 31 land development projects on Native Customary Lands in various stages of development covering a total area of 248,337 hectares, out of a total area under oil palm by the same date of 543,399 hectares. A further 65 *Konsep Baru* projects are planned.⁴⁸

Ostensibly in order to avoid confusion over lands and to avoid unrepresentative leaders from doing deals direct with investors, the *Konsep Baru* prohibits direct negotiations between communities and investors and requires State agencies to mediate in matching community lands with companies. Companies interested in developing plantations first have to file an application to the Ministry with a detailed investment and land development plan. The lands of interest to the company must then be surveyed by the State's Lands and Surveys Department to verify the extent of areas under Native Customary Rights. Lands and Surveys then draws up maps which show the external boundaries of NCR areas and also keep records of which individuals hold approximately how much land within the block. Land rights allocations within the blocks are handled by an Area Development Committee which comprises the *penghulu* (chief) and the headmen of participating villages.⁴⁹ Any disputes over land between community members are to be resolved by native courts.

The scheme is still too new for there to be actual experiences with the expiry of the sixty year leases. According to the official documentation, for the period of the lease all the lands are held under a single land title retained by the private sector company as majority shareholder of the joint venture. The land, which is only to be used for agricultural purposes, can only be transferred to another party with the express permission of the Minister for Land Development, while the community members' shareholdings (and future rights in returned lands) can only be transferred to close kin. However, on expiry of the lease, the customary owners may either decide to renew the arrangement with the same or another company, or take the land back under communal ownership, or have the land subdivided and titled to the original owners as individual land holdings.⁵⁰

⁴⁸ Ministry of Land Development nd.

⁴⁹ *Penghulu* and village headmen (*tua kampong*) are positions recognised by government. They gain a modest stipend for their role in the local administration.

⁵⁰ Ministry of Land Development nd.

Academic studies of the implementation of the *Konsep Baru* have pointed out a number of weaknesses in the scheme. A study by Majid Cooke, published in 2002, found that communities' reactions varied from region to region. Downstream communities that had benefited from previous State development schemes such as road building and service provision tended to be more trusting of the government's role and more welcoming of the concept, while upriver communities that had suffered from the imposition of logging on their customary rights areas were much more suspicious of the government's motives, were sceptical about the reality of promised benefits and so rejected the schemes.

The study noted that many Dayak groups sought to head off the takeover of their lands by *Konsep Baru* projects by themselves strategically planting oil palms or other crops along the boundaries of their customary lands, both to assert their rights in land and demonstrate that the land is already productive. Dayaks interviewed in the study were sceptical of the impartiality of the government agencies acting as trustee for the people, concerned about the possible impacts of market fluctuations and worried by exactly how and with what legal entitlements their lands would be returned to them after the expiry of the 60 year leases.⁵¹

A further study by Majid Cooke has interpreted the *Konsep Baru* as a scheme for extending State power over 'backward' Dayak groups. Majid Cooke argues that the whole concept is based on a 'fundamental error, arising from a misinterpretation of unoccupied land as 'idle' or 'waste' land'.⁵² Further concerns about the schemes were voiced in a series of hearings held by SUHAKAM, the Malaysian Human Rights Commission, in 2004 and 2005. Press accounts summarised by Majid Cooke noted that at these hearings Dayaks raised a number of questions about the *Konsep Baru*, complaints focusing on the frequent encroachments on their lands, the sluggish pace and defective procedures used to survey their lands since the passing of the revised Land

⁵¹ Majid Cooke 2002.

⁵² Majid Cooke 2006:27.

Code Amendment in 2000 and the unfair limitations on their right to buy and sell their lands.⁵³

According to another study, many of the officials implementing the schemes themselves do not really understand the legal and economic implications of the *Konsep Baru*.⁵⁴ Majid Cooke found that, when Dayaks pressed for explanations of the full implications of their involvement in projects that they were being invited to join, they were labelled as ‘anti development’, excluded from subsequent public meetings and left out of further decision-making. In some cases the schemes then went ahead on their lands regardless, leading to direct clashes as bulldozers moved in on the lands of those who had come to oppose the projects.⁵⁵

A further review by Bulan, found that many people participated in the pilot *Konsep Baru* projects in Baram and Kanowit districts ‘without a full understanding of what such alien concepts as the trust, joint venture, or shares in the company entailed’. He also notes the risks that the government’s roles as a trustee could be abused by a conflict of interest, as both a promoter of private sector interests and guardian of the interests of the native landowners. Moreover, under English common law traditions, trustees are not meant to have a financial interest in the assets they manage on behalf of their wards.⁵⁶ Under the *Konsep Baru*, the State takes a 10% interest, agency personnel are employed to further the schemes and 30% of monies paid for surrendered lands are invested in Government unit trusts. Bulan concludes that further safeguards of native rights are needed if conflicts are to be prevented, one solution being that instead of promising title to landowners on the expiry of the lease, their rights in land should be clearly titled before they decide whether or not to engage in a joint venture.⁵⁷

⁵³ Majid Cooke 2006:30.

⁵⁴ Majid Cooke 2002 citing Ngidang 2002.

⁵⁵ Majid Cooke 2002: 40-41.

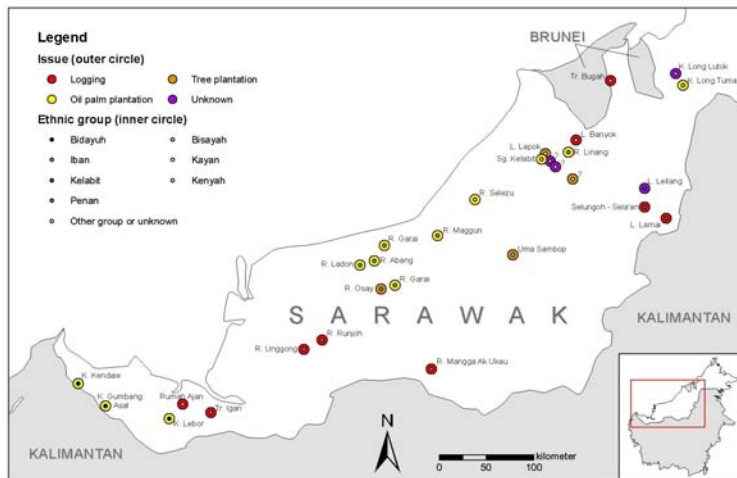
⁵⁶ Bulan 2006:53-54.

⁵⁷ Bulan 2006:45, 61.

6. Oil Palm Plantations in the Courts

Indeed, conflicts between native peoples claiming customary rights in lands and imposed development schemes have been a long term problem in Sarawak.⁵⁸ According to press accounts there are currently some 150 cases in the courts of Sarawak relating to such disputes. Of these we have been able to identify about 100 cases filed by native plaintiffs, 40 of which are cases that include charges against oil palm developers. (The map below shows the locations of about one third of all these cases).

Selected NCR court cases in Sarawak / Malaysia



⁵⁸ Hong 1987; Colchester 1992.

The cases we have identified are set out in Table 1 (below). All the cases were initially been filed in the divisional courts in Kuching, Bintulu, Miri and Sibiu. The cases concern a variety of misdemeanours including lack of recognition of customary rights, lack of consultation, lack of prior and informed consent, encroachment on customary lands, and direct dealing with village chiefs without community consultation. The great majority of the cases are awaiting trial. Some have been pending for almost a decade. Others are in progress. A few of the cases have already been heard and some have gone to appeal, and in one case have been appealed again to the Supreme Court in Kuala Lumpur.

What the cases show clearly is that disputes are arising because there is a lack of clear recognition by the Government of the extent of customary rights in land and a lack of adequate consultation with community members prior to investment decisions being made. In many of the cases, lawyers acting for the plaintiff communities have charged the Lands and Surveys Department and the State Government as co-defendants for failing to recognise customary rights areas and for making the lands available to the companies without the agreement of the affected groups. As noted above, this results from the very limited recognition that the State Government gives to customary rights.

Table 1: Oil Palm Cases in the Sarawak Courts

| Date Filed | Communities | Ethnic group | Defendants | Status of case |
|-------------------|--|---------------------|---|---|
| 26/07/2001 | Selezu, Setulai and Sepadok, | Iban | Ladang Sawit Bintulu Sdn Bhd, Lembaga Tabung Haji (Muslim Pilgrimage Fund), Semai Mekar Sdn Bhd, Lands and Surveys Department, State Government | Trial underway |
| 22/12/2006 | Kampung Remun | Iban | DD Pelita Gedong Plantations Sdn Bhd | Case underway. Ex-parte injunction requested by defendants dismissed with costs awarded to the defendants |
| 15/10/2004 | Long Banyok | Kenyah | Baram Trading Sdn Bhd | Awaiting trial |
| 31/10/2003 | Kendaie, Pasir Hilir and Pasir Hilir Tengah | Bidayuh | Syarikat Ladang Dafa Sdn Bhd State Government | Awaiting trial |
| 28/04/1999 | Bunau, Sekabang | Iban | Kanowit Oil Palm Plantation Sdn Bhd, State Government | Case withdrawn |
| 7/04/2003 | Sungai Pesu, Tubau | Kayan | Tamex Timber Sdn Bhd, Superintendent of Lands and Survey Department, State Government | Awaiting trial |
| 25/02/2004 | Long Semutut, Belaga | Kenyah | Shin Yang Forestry Sdn Bhd, Ekran Plantations Sdn Bhd, Belukuk Lusat, Superintendent of Lands and Survey Department, State Government | Awaiting trial |
| 26/01/1999 | Sungai Sekabai, Sungai Tajem and Sungai Ipuh | Iban | Borneo Pulp Plantations Sdn Bhd, Borneo Pulp and Paper Sdn Bhd, Superintendent of Lands and Survey Department | First trial ruled in favour of plaintiffs, appeal case ruled in favour of defendants, now awaiting for leave of appeal to Federal Court |

| Date Filed | Communities | Ethnic group | Defendants | Status of case |
|-------------------|---|---------------------|---|----------------------------|
| 24/11/1998 | Kampong Lebor | Iban | LCDA, Nirwana Muhibbah Sdn Bhd, State Government | Awaiting trial |
| 28/10/2004 | Sungai Bong | Iban | RH Plantation Sdn Bhd, Marabang Lumber Sdn Bhd, Pelita Melor Sdn Bhd, Superintendent of Lands and Survey Department | Awaiting trial |
| 28/06/2004 | Long Jegan, Long Teran, Long Tabing and Long Takong | Berawan | Rinwood Pelita Plantation Sdn Bhd, Superintendent of Lands and Survey Department | Awaiting trial |
| 24/02/1998 | Long Lapok | Kayan | Rinwood Pelita Plantation Sdn Bhd | Awaiting trial |
| 6/09/2005 | Kampong Tubih | Bidayuh | Jangkar Plantation Sdn Bhd, Superintendent of Lands and Survey Department, State Government | Awaiting trial |
| 5/12/1998 | Sungai Lamaus | Iban | Superintendent of Lands and Survey Department, State Government, BHB Sdn Bhd | Awaiting trial |
| 15/10/2004 | Rumah Galin, Rumah Tumpa and Rumah Madel | Iban | Ladang Selezu Sdn Bhd, BBC Estate V Sdn Bhd, Superintendent of Lands and Survey Department | Awaiting trial |
| 16/04/1999 | Rumah Sidu, Sungai Entulang | Iban | Sarawak Oil Palms Berhad | Awaiting trial |
| 12/07/2003 | Rumah Lampoh and Rumah Kasau | Iban | Pelita Diwangsa Bhd, Sri Minah Enterprise Sdn Bhd, Superintendent of Lands and Survey Department, State Government | Awaiting trial |
| 3/02/2005 | Rumah Lampoh and Rumah Kasau | Iban | Superintendent of Lands and Survey Department, State Government | Subject to judicial review |
| | | | | |

| Date Filed | Communities | Ethnic group | Defendants | Status of case |
|-------------------|---|---------------------|---|--------------------------------------|
| 15/12/2006 | Rumah Unand | Iban | Government of Malaysia, Tuan Yang Terutama Yang dpertuan Negeri Sarawak (Trustee for Native Rights), State Government, Superintendent of Lands and Survey Department, Grand Perfect Sdn Bhd, Hariwood Sdn Bhd | Awaiting trial |
| 28/05/2007 | Rumah Giri | Iban | 5 individuals and Hui Young Sdn Bhd | Awaiting trial |
| 22/05/2004 | Rumah Utat, Rumah Muyang, Rumah William Tingang | Iban | SOP Plantations (SUA) Sdn Bhd, Superintendent of Lands and Survey Department, Director of Lands and Surveys Department, State Government | Initial ruling now subject to appeal |
| 21/04/2001 | Rumah Anjat anak Andom | Iban | Superintendent of Lands and Survey Department, State Government, Medan Mestika Sdn Bhd | Awaiting trial |
| 00/08/1997 | Rumah Bangga, Rumah Pengan, Rumah Sidu, Rumah Kiai, Rumah Janting | Iban | Segarakam Sdn Bhd, Prana And Bhd, Empresa (M) Sdn Bhd, LCDA | Awaiting trial |
| 23/05/2006 | Kampung Bulau, Kampung Bukit Melanjan, Rumah Genathan, Sungai Kenyalang Pidek, Rumah Kunjan | Iban and Malay | - | Awaiting trial |
| 09/11/2005 | Rumah Rayong, Sungai Bong, Sungai Ampun | Iban | Superintendent of Lands and Survey Department | Awaiting trial |

| Date Filed | Communities | Ethnic group | Defendants | Status of case |
|-------------------|---|---------------------|--|---|
| 22/12/1998 | Sungai Pelajau | Iban | LCDA, Loagan Bunut Plantation Sdn Bhd, State Government | Awaiting trial |
| - | Kampoong Tanjong Teran and Sungai Metegai | Kayan and Kenyah | LCDA, Rinwood Pelita Plantation Sdn Bhd, State Government | Awaiting trial |
| 07/05/2003 | Long Koyan and Long Bala | Dayak Seping | Superintendent of Lands and Survey Department, State Government | Awaiting trial |
| 05/05/2002 | Long Koyan and Long Bala | Dayak Seping | Superintendent of Lands and Survey Department, State Government, Samling Plantation Sdn Bhd | Awaiting trial |
| 15/04/1998 | Rumah Lasan and Rumah Timboo | Iban | Superintendent of Lands and Survey Department, State Government, Sarawak Oil Palm Bhd. | Ruling in favour of plaintiffs 13/11/2006 |
| - | Rumah Banyang, Rumah Agam, Rumah Tumpa | Iban | BBC Estate VII Sdn Bhd, Naim Cebdera Tujuj Sdn Bhd, Superintendent of Lands and Survey Department, Director of Lands and Surveys, State Government | Awaiting trial |
| 07/05/2003 | Long Koyan and Long Bala | Kenyah | Superintendent of Lands and Survey Department, State Government, Siolid Oil Palm Plantation Sdn Bhd | Awaiting trial |
| 16/06/2002 | Kampung Merakai | Iban | Superintendent of Lands and Survey Department, State Government, LCDA, Nirwana Muhibah Sdn Bhd | Awaiting trial |
| - | Kampung Sungai Limau/ Kual | Iban and Malay | FELDA, Superintendent of Lands and Survey Department | Awaiting trial |

| Date Filed | Communities | Ethnic group | Defendants | Status of case |
|-------------------|--|---------------------|---|-----------------------|
| - | Kampung Sungai Limau/ Kuala | Iban and Malay | FELDA, Superintendent of Lands and Survey Department | Awaiting trial |
| 05/05/2003 | Kampung Sebako, Judin, Semapu, Sarayan, Sarayan Ulu, Sebiris, Tebaro, Sedaing, Tanjam, Perundnag, Opek and Jangkar | Bidayuh/ Selako | Superintendent of Lands and Survey Department, State Government, Sara-HL Plantation Sdn Bhd | Awaiting trial |
| 20/03/2003 | Kampung Plaman Engkeroh | Bidayuh | Tetanga Akrab Sdn Bhd, State Government | Awaiting trial |
| 20/12/2001 | Kampung Mentuh Tapu | Bidayuh | Tetanga Akrab Sdn Bhd, State Government | Awaiting trial |
| 20/10/2000 | Kampung Sungai Niang | Iban and Bidayuh | Tetanga Akrab Sdn Bhd , Superintendent of Lands and Survey Department, State Government | Awaiting judgement |
| 30/03/2005 | Kampung Tekuyung, Apeng and Abok | Iban | LCDA, Pelita Holdings Sdn Bhd, Tetanga Akrab Sdn Bhd, State Government | Awaiting trial |

7. Community Experiences with Oil Palm Plantations

In order to gain a better understanding of community members' own perceptions of oil palm plantations, as part of the research for this publication we undertook a survey during 2007 of 12 communities spread between the Baram in the north and the Bidayuh and Selako areas in the very south.⁵⁹

Penan Community of Long Singu

The Penan are a traditionally wide-ranging hunting and gathering people of Borneo, who inhabit the forests of the interior. They have a deep knowledge of how to live from the forests and, even though their settlements move around quite frequently, they retain very close ties with their lands, remaining within the same territories for many generations. Traditionally they have been reliant on wild palm sago for their staple and only relatively recently have some groups chosen to settle down to develop farmlands. Even so, most continue to rely extensively on the forests for game, craft materials and for many other purposes.

One such village is the Penan community of Long Singu, which has inhabited the Peliran area in the Upper Rajang river for many generations. The current residents, who today number some 200 people, recall that they were in the Peliran area during the Japanese Occupation. At that time they lived in Long Lua, which is not far downstream of their present settlement. They recall that a British officer known as Tuan Arnold visited them in 1955 when they were settled at Long Layan, on the Sungai Lua in Peliran. The leader of the Penan at that time, they recall, was Tingang Bajang.

⁵⁹ See annex 2 for the methodology and questionnaire used.

In the 1970s, the community started to settle down and learned to plant cassava, banana, and tobacco. Gradually, they have also learned to plant and cultivate *padi* rice but they still depend greatly on forest products and wildlife from the surrounding forest areas and nearby rivers and streams for their daily needs.

When asked for his views about the plantation development in his surroundings, the community leader (*Tua Kampung*), Alung Ju, had this to say.

The plantation development started in our territory sometime in 2002. I came to hear about it from the workers of Shin Yang. There has been no consultation until now with my people of Long Singu. Some parcels of *temuda* (fallow plots of cultivated land), fruit trees and burial sites were damaged and destroyed but no compensation given. Our *temuda* at Sungai Laket, Sungai Sepet, Sungai Panga, Sungai Tiong, Sungai Mtem and Sungai Tau (tributaries of Sungai Peliran) [have also been affected]. The forest was cleared right up to the banks of the river. We have not been informed and consulted by government officers until now. We were not approached by people before the plantation project to find out about our views, concerns and interests regarding such a project. We do not have any agreement with the company so far. The company just proceeded with its operation in our area and did not inform us of the extent of the area to be opened up.

I am very concerned about this development because it affects my people's livelihood. I do not agree with this type of development and the manner it is conducted. The development of plantations in the area will definitely result in the destruction and loss of resources on our lands which we depend [on] for our survival. The company should recognize our existence here. Our people were born here, brought up and nurtured in this area and we want to continue to live on this land and surrounding forests.

We have complained to SUHAKAM (the Human Rights Commission of Malaysia) about our problems and it has sent some representatives to visit our settlement and see the situation for themselves. We are still unsure what kind of action will be taken on our problems by the government.

Bulan Usang, a 33 year old woman also from Long Singu, Peliran, reported the following.

I am concerned and do not agree with the oil palm plantation development. It has destroyed my *temuda* and crops but no compensation has been given yet. This company does not want to provide transport for our people. The company's management is not helpful and understanding. Our people will face lots of problems because we are illiterate and uneducated and will not be able to look for employment to make a living. Our people have no identity cards or documents which are required for employment.

The government should assist us to improve our livelihood and standard of living and not allow the company to deprive us or destroy our livelihood. Now we cannot make rattan crafts because there is no more rattan and no more *gaharu* (incense wood) because of intensive logging.

Penan Community of Long Pelutan

Not far away from the Penan of Long Singu, another group of about 200 Penan live in Long Pelutan, sometimes also known as Long Menapa. The community was formerly part of the Penan community of Long Lua, in the Peliran area. After they split, the group moved to Long Menapa and some years later, they moved to their current location at Long Pelutan, the present longhouse site, which has some 28 'doors'.

Lian Bue', is the village headman of Long Pelutan and gave us this account of his experience with the oil palm companies.

The company that operates in our area is Shin Yang Sdn Bhd. It extracted timbers and opened up oil palm plantations. It started oil palm plantations in our area in 2005. Before setting up camp at Lakin, it paid *pemali* (a customary fee) of M\$1,000.00 to our community. The company told us that our community is not allowed into reserved forest [and said] all the area must be logged because it has been issued a licence. They have told us all our village's forest reserve will be entered and will start to be logged by this July 2007. [To ensure we retain a good supply of drinking water,] my community has marked the boundary of the catchment area with paint to prevent encroachment. We have yet to report the matter to the relevant government departments.

Like many Dayak peoples being affected by oil palm developments, that are coming in behind the logging companies, the Penan of Long Pelutan feel that their customary rights to their lands and forests and being overridden by the government and the companies. Notes Lian Bue’:

As far as our people is concerned, we are not aware of or have not been informed that our area has been declared or gazetted for other purposes. As such, we still regard our land as our customary lands where we can still have rights. The company people did tell us that we have no rights to the lands but we have been here for generations.

With regard to consultation Lian Bue’ noted the following:

There was no discussion or consultation with us by any government departments or officials regarding the development plan for the area. Our people only heard from other sources that the area is to be opened up for oil palm and tree plantation.

Community members also lament that the oil palm company has made no effort to compensate the community for its losses. Lian Bue’ again:

Most of our *temuda* (fallow farmlands) and crops damaged have not been compensated. Some of my people have waited for several months and even for more than a year but still not given compensation.

Another member of the Long Pelutan community whom we spoke to was Jalong Ugi, a farmer and hunter, in his 40s.

The site of our old settlement at Sungai Biak, tributary of Sungai Lua was encroached and completely destroyed by Shin Yang in 2006. The old site was cultivated with fruit trees which usually bore fruits. The company entered the area without even asking for our consent. Until now, no compensation has been given. Other companies have respected our rights to the said lands and crops but Shin Yang has simply bulldozed its way in. The manager at Lakin Estate has not shown any respect to us. Many of our hunting dogs have been hit and killed by the company’s workers but no compensation given.

Apek Uda, a Penan woman, is over 60 years old and another member of Long Pelutan. She is particularly worried about how her grandchildren will make a living in the future.

I am concerned about the company's operation in our area. The company has bulldozed my family's lands and crops to make way for the oil palm plantation. Oil palms have been planted on the lands which we have cultivated and left fallow. These lands are situated at Sungai Biak, Sungai Lua, Sungai Pelutan, Sungai Menapa, and Sungai Layun. I am very unhappy, angry and disappointed with the company because it has not compensated us for the damages and losses suffered. We are deprived of our lands.

Penan Community of Long Jaik

A third Penan community visited as part of this research is Long Jaik on the Sungai Seping, also in the Belaga area of the Upper Rajang. Long Jaik is a smallish longhouse of only 20 'doors' with about 42 families. According to their own traditions, this Penan community has lived in the Seping area for not less than eight generations. They inhabited the area several decades before the Japanese Occupation and recall being visited by British officers during the colonial period, such as Tuan Arnold, Tuan Urquhart and Tuan Pikun. In the 1980s, a European researcher also visited and stayed at the village for some time to study the Penan's culture and way of life.

They moved to their current longhouse site in 1992, having previously been settled along other parts of Sungai Jaik. Matu Tugang, the Village Chief of Long Jaik, gives this account of his community's experience with oil palm development:

Plantation development in my area for oil palm is carried out by Shin Yang Sdn Bhd. It started to open up lands within our area in 2005 at Ba' Milik Malat. Several parcels of our Native Customary Rights lands were encroached, damaged and used for oil palm plantation. The company's General Manager and Manager came to inform us that they want to use the lands for oil palm plantation. They said that we cannot stop or restrain them because it is wrong for us to do so. They also said that if we prevent them

from using the lands, we'll not be paid any compensation and that they will still proceed to use the lands. The manager mentioned that the *Towkay* will *main kasar* (play rough) with us. We were told that we will be imprisoned. The General Manager told me that the company was issued the licence to use the lands and so the Penan cannot stop it from opening up the lands. The company fixed the rate of compensation at M\$ 300 per hectare for our NCR lands. Our old plots of NCR lands were not compensated. Fruit trees such as *durian*, *dabai*, *alim*, *rambutan* etc. are paid at M\$10 per tree. This is inadequate. If we buy just one durian fruit in town, it usually costs around M\$10 already and here we are paid M\$10 for one whole durian tree!

Although the *Konsep Baru* approach is meant to require the informed consent of communities, this has not been Matu Tugang's experience.

So far until now, our people have not been informed or notified that the lands in our area or surroundings have been gazetted for other purposes or to be used for oil palm plantation. We have not received any notice since before until now. We have not been consulted or informed by government officials or representatives regarding the present development for our lands. The company representatives and Manager only told us verbally that their licence covers the whole area. But we have not been shown any official map showing the actual licence area.

Residents are concerned about how they will manage to make a living in these changed circumstances. Notes Matu Tugang:

Our people are filled with anxiety with the current manner of development whereby the company wants to open up and take over most if not all of our land for plantation purposes. Our people are also worried about its impact on our resources, livelihood and environment. This is because our livelihood is greatly dependent on the resources in our surroundings.

As noted, the case has been looked into by the Malaysian Government's Human Rights Commission (SUHAKAM), which issued a report in 2007. According to the SUHAKAM report, there are seven Penan villages - Long Singu, Long Jaik, Long Pelutan, Long Peran, Long Luar, Long Tangau, and Long Wat - all within the 156,000 hectare, 60 year Planted Forest Licence, which Shin Yang has secured for the area. The area also overlaps the previous Licence for Protected

Forest (LPF/0018) which was issued to Shin Yang Forestry Sdn Bhd on 19 November 1999, and a Provisional Lease, Lot 1 Danum Land District, which was issued to Danum Sinar Sdn Bhd, a member of the Shin Yang Group. These impositions have led the Penan to dispute the company's entry.

We were informed recently by the company's management that they want to open up some more of our lands, which we have cultivated, by July or August, 2007. We have objected but they are keen to proceed. My community together with three other Penan villages affected by the plantation company agreed and decided to file legal action against the company and other parties involved, in our effort to assert and protect our rights to our lands.

Iban Dayaks of Rumah Dunggat and Rumah Lampoh

The Iban are one of the largest ethnic groups in Sarawak. Traditionally they live in extended longhouses situated alongside rivers and creeks which they use for transportation, drinking and cooking, bathing and washing. They practise mixed economies, combining permanent rice farming with rotational agriculture including forest fallows, livestock raising, hunting, fishing and gathering as well as wage labouring and interactions with local markets. Many Iban also have well developed rubber gardens to generate a reliable cash income from their lands. They plant extensive areas of fruit trees, many of which enrich old fallows and prior village sites. Like other Dayak peoples, they also maintain a complex body of customary law which is used to regulate village life and which orders the process by which farmlands are developed and inherited.

Nearer Bintulu are two Iban communities, Rumah Dunggat and Rumah Lampoh, which are also being affected by oil palm developments and which were visited in the course of this research. These Iban note that they have inhabited their current area long prior to the Japanese Occupation. When their forefathers first moved to the area, their then chief, Tua Rumah Gerinang, requested land from Datuk Abang Naga, the then Chief of the Malay village of Jepak. The land allocated by Datuk Abang Naga with its specified boundary has been maintained until today. During the colonial era copies of the map, setting out the agreed area, were kept in the Resident's and the District Office. The full

extent of the territory and its boundary was mutually respected and maintained by the neighbouring Malays and Ibans since that time. When disputes occurred, following encroachment and occupation by other Ibans from other areas, the map and document were referred to. The ‘intruders’ had to be evicted and they moved back to their original place. In the 1970s, following another dispute over lands, a letter of understanding was made out to enforce the earlier arrangements and agree the delineation of lands. This was agreed to by the community leaders, both Malays and Iban, and endorsed by all parties. The people of these two longhouses, Rumah Dunggat and Rumah Lampoh, used to live together in one longhouse before they split in 1981 but they still share a common territory.

These two villages now face the take-over of their area for oil palm development by Pelita Diwangsa Sdn Bhd, which is itself a joint venture company between Pelita Holdings Sdn Bhd and Golden Valley Golf Resorts Bhd. According to official documents, the provisional leases, for Lots 356 and 357, in Block 35, Kemena Land District, were issued to Pelita Diwangsa on 6 February 2002 for a period of sixty years. Lot 356 covers an area of 2,700 hectares and Lot 357 covers an area of around 300 hectares. These two leases form only two parts of a much more extensive scheme, leased to the companies under a number of different licences by the LCDA, which, according to the local residents in the area, will affect a further 15 villages, where plantation activities have yet to start.

According to the Headman of Rumah Dunggat,

The lease or licence of the company affects more than 3,000 hectares of our native customary lands. Some 2,600 hectares have already been cleared and planted with oil palm. There was no consultation prior to the issuance of the provisional lease over our customary lands or prior to the opening up of the oil palm plantation on our customary lands. There was no negotiation at all with regards to the terms and conditions of its operations on our customary lands or within our traditional territory. Our people were, and are still, upset. When we learned of the company’s entry into our customary lands, we protested and put up signs to warn against encroachment. But later, the company moved in from another location and bulldozed its way into our customary lands. We approached them and imposed a fine for “restitution” in accordance with our customary law and practice. But the company

adamantly moved in again, giving the excuse that it has to develop the area within its licence. We imposed a fine for a second time, an amount triple to that of the first fine.

However, compensation for our native customary rights lands and crops planted thereon was not given by the company. The company refused on the grounds that the lands are considered to be Statelands and as such our people are not entitled to compensation. Even though our crops, such as pineapples, coconuts and others, were planted there with the assistance from Agriculture Department. More than 300 coconut and sago trees have been destroyed. These are owned by a number of families. The destruction of these crops has deprived them of their sources of income and food.

Two of our rivers are affected, namely, Sungai Lupak and Sungai Mas. The company cleared lands and forests right to the river bank without leaving any buffer zone. Fish are getting hard to obtain because of the change in the water condition and quality.

The Iban community of Rumah Dunggat together with the community of Rumah Lampoh, a longhouse consisting of 86 doors, have filed a civil suit against Pelita Diwangsa and three other parties, including the Government of Sarawak. Among the reliefs sought are: a declaration from the court that they have acquired and or created individual and or communal native customary rights over the disputed lands within their established customary territory and are still the lawful proprietors of the same; a declaration that this right precludes any one or more of the defendants from impairing or abridging the plaintiffs' rights in the said land; a declaration that as a result of the impairment and abridgement of their native customary rights over the said lands, they have consequently suffered losses and damage; a declaration that the issue of the said provisional lease over the said land is in violation of Article 5(1), Article 8(1) and Article 13(2) of the Federal Constitution.

Iban Dayaks of Rumah Rayong

Rumah Rayong is an Iban settlement of about 32 families situated on Sungai Bong a tributary of the Teru which in turn flows into the Tinjar, a major affluent of the Baram in northern Sarawak. The community recalls that it has inhabited

the Sungai Bong area since the Brooke era (prior to the Second World War). They have established boundaries with the neighbouring communities which are maintained and respected until now. They have documents from government departments for their rubber gardens and even had land leases from the government in the old days. Rayong Ak Lapik, former Headman of the community explains their current predicament:

Our civil suit against the LCDA, which has been issued with provisional lease that overlaps our native customary lands in the Sungai Bong and the Sarawak government, is still ongoing. We are requesting the exclusion of our NCR lands from the lease. Our people should have the right to determine the usage of lands and not simply have them given to companies. We have cultivated our lands with some cash crops such as rubber while some are meant for rice farming and other cash crops. We have never been consulted prior to the issuance of the lease over our lands for plantation purposes and we have never requested for the lands to be included in the plantation. We also did not appoint and or authorise any companies to come and convert our lands for the oil palm plantation. That is why right from the time they (companies) wanted to come in and develop our lands, we had objected and staged peaceful protests. The authorities responded by arresting, remanding and charging our people in court. But we never gave up. As a headman at that time, I feel it is my responsibility to obtain, and act in accordance with, the consensus of my people to protect our rights to our lands and properties.

In my effort to collectively struggle for the protection of our NCR lands, I was even issued with a letter to terminate my appointment as a headman. But my people are solidly behind me. I should not betray the trusts, interests and future of my people for personal interests or gains. How can I support actions that would deprive my own people of our rights to our lands? My people do not oppose development if it takes into account our rights and long term interests, but it must be seen to really benefit us.

Iban Dayaks of Sungai Apun

Sungai Apun is another Iban village on the Sungai Bong which has been affected by the same development scheme. We interviewed Francis Ak Imban, who is Chairman of Bong Iban Community Association. As he explains:

The State government has issued a provisional lease to LCDA (Land Custody and Development Authority) which covers our native customary lands in the Sungai Bong, Teru, Tinjar area. The customary rights lands of the five Iban villages in the Sungai Bong area are all included in the lease. The leases were issued to develop the area into oil palm plantations. Presently, there are four joint venture companies operating in and surrounding the Bong and Teru area.

The vast majority of the residents of the five villages in Sungai Bong have objected to the inclusion of our native customary lands for the plantation project. We decided to file a civil suit against the LCDA and the Sarawak Government sometime in 2000, after we found out that our customary rights lands are included in the provisional lease.

However, despite our direct protests against the usage of our customary rights lands and while waiting for the civil suit to be heard, a company, Boustead Sdn Bhd has proceeded to open up and use our lands for its oil palm plantation. Some 450 hectares of our lands have been occupied and planted with oil palm by the company. Rubber trees and fruit trees planted by our people on the affected lands and burial sites of our ancestors on the said land were damaged and destroyed. There was no compensation given yet.

Meanwhile, we are also filing legal action against two joint venture companies that have started their activities in our area for the oil palm plantation.

Iban Dayaks of Rumah Jupiter

Another cluster of Iban villages affected by oil palm development are those in the Suai area which are situated alongside four creeks, Sungai Gelasa, Sungai Lembong, Sungai Selabi and Sungai Tibus. Tua Rumah (Village Headman)

Jupiter Anak Segaran of Rumah Jupiter a village of some 28 families explains their situation.

A company, Ta Ann Bhd has been issued a lease by the authorities to develop the lands in our area. The lease or licence covers a huge area and it affects the customary lands of around four villages, namely Rumah Meringai, on Sungai Lembong in Suai, Rumah Senit on Sungai Selabi in Suai and Rumah Libau, on Sungai Tibus in Suai. The lease is divided into lots. Each lot is made up several hundred or thousands of acres. My customary lands are under Lot 96 and it affects some 2,700 acres of our lands. Presently, a contractor, Butra Semari, is operating in the area extracting whatever timber resources are available before the area is cleared for oil palm plantations.

Our community has lived in this area for many decades and we had cultivated the land with *padi*, fruit trees and some cash crops including oil palm on a small scale. But now, we are told that we have no rights and we were even ordered to stop using and cultivating our lands. If the government has acquired our lands and give it to the company, why are we not informed or notified and compensated accordingly? Our lands and properties are taken from our back and issued to others. This is sheer robbery. The government and our leaders should be protecting our rights to our lands and not simply giving it to others without informing and consulting us. Some people are allowed to thrive but some are left to be deprived. We have engaged a lawyer to defend us and to apply for the order to be set aside.

Iban Dayaks of Selezu, Sepadok and Setulai

In explaining their ties with their current lands, the Iban communities of Selezu, Sepadok and Setulai explain how they initially came north into the area with the extension of the rule of Rajah Brooke over the area sometime soon after 1870. After a tumultuous history of village warfare during the late 19th century, the communities established themselves in their present locales between 1917 and 1924. Today the communities find themselves close to the main road to the industrial centre, Bintulu, and practise the mixed economies characteristic of Iban, combining self-sufficient farming and shifting cultivation with cash cropping of rubber, fruits and black pepper. Their lands are now threatened by oil palm companies.

According to Beluka anak Agi, the son of the headman Agi Anak Bungkong, and plaintiff in the court case, the Selezu, Setulai and Sepadok people's court action is no ordinary case insofar as the defendants are concerned. In addition to the Sarawak Government which issued the provisional lease to the private companies, there is the involvement of the Lembaga Tabung Haji (Muslim Pilgrimage Fund) of Malaysia. This is a Malaysian Government fund established under the jurisdiction and management of the Federal Government.

The people first found out about the oil palm scheme when workers started work on their lands, clearing the lands which included rubber trees and fruit trees belonging to the indigenous communities. As the oil-palm land clearing work continued, the rivers that supplied water to the people and the fish stock were affected. In addition to the crops, and polluted rivers, the people's burial ground and farm lands were also destroyed. People were then unable to hunt for the game which is an important element in their diet. There was no more rattan to harvest either, the raw material for handicrafts which had provided extra cash income to the communities. Jungle food sources, like vegetables, were also destroyed. This combined to make life much more difficult for the villagers.

When the villagers sought compensation for the destruction of their crops, the companies just ignored their demands. The companies disregarded completely whatever request came from the villagers on the grounds that the people had absolutely no NCR lands in the disputed areas.

Then the people approached the workers to ask that the workers stop destroying the crops before discussing with the people concerning their communal lands. Numerous police reports were then lodged by the community people but when no action was taken by the police, the people stopped the workers from destroying the crops.

Firstly, the companies did not inform the community people when they started work. Nor did the companies inform the people what they would be planting on the community's lands. Absolutely no information was provided by the government or the companies to the affected communities before the land clearing work began. When the community people stopped the workers and

went to meet company officials to inform them of their disapproval of the companies' work, the people were told that they had no NCR lands and that they were on State and company lands.

The community then wrote to Sarawak Government Ministers including the Chief Minister and Land Minister, lodged several police reports, wrote to the Malaysian Police Headquarter in Kuala Lumpur and the head of Sarawak police in Kuching with copies of the police reports, wrote to the District Office, the Resident's office and the area headman to show their disapproval of their lands being taken and that the companies must discuss with the community people before work can resume. However, with the exception of an Assistant Minister, whose reply was on payment on customary rights and who referred the matter to the local district office, no reply was ever received from any other party. No action was forthcoming from the district office.

The people know of no effort from the government or the companies to demarcate their communal lands. When the community people asked for clarification from the companies, they were shown a map and informed that the area was all State lands, even though community-planted crops were on the lands. It was as if there was no settlement in the area.

Asked if the community had consented to the scheme, Beluka replied:

Since the people did not know anything about the project, and there was no discussion with the villagers, how can the people have agreed to the scheme? Furthermore, they are taking the people's lands, for free, from the people. The companies said there are no land titles and thus not communal lands but the people rejected such claims as the people had settled on and used the lands for a long time. The companies had promised to connect piped water from the public system to the communities but that was all lies.

This is despite the fact that water from the communities' original water-catchments areas was not fit for drinking anymore after the rivers supplying water had been polluted. So the people incurred the additional cost of having to buy tanks to collect rain water for consumption. This water can't also be used for bathing.

Failing to get anywhere, the community people took the last available peaceful step by blockading the access road leading to the companies' working area. Only then did the companies agree to pay compensation for *pemali menuo* while, for tree crops, they paid only M\$1 – M\$5 per tree. While there are some who took the compensation, others, such as those from Agi's village did not. People considered the compensation amount unfair and unjust.

The people also took the case to the Native Court in which the area-head (*Penghulu*) presided over the hearing. The court agreed that the companies must pay compensation to the people according to the Public Works Department's scale of payment. However, the companies refused to abide by the Native Court order.

The people then took the matter to the highest Native Court, the Chief Superior Court in which the *Pemancha* (Paramount Chief) presided over the matter. This court concluded that the villagers did have NCR over the disputed lands. With no action after that, and as the people disagreed with the whole oil palm scheme and the loss of lands, the people took the companies and the government to the civil High Court.

Just as the case was coming up for a first trial hearing, which was held in March 2007, the companies sent a representative to approach the villagers and offer to pay compensation to the affected villagers and settle the matter out of court. However, the villagers turned down the offer as the offered price was considered too little. In the mean time, the planting of palm oil continued, even after the filing of police reports, the native court hearing and the civil suit. The companies had insisted that the planting would continue until the whole provisional lease area was covered. To Beluka, NCR lands are inherited from his ancestors and it's not just for him but something passed down from ancestors and they are their rights. The people are definitely not happy with the loss of their lands and the way their land rights were denied.

A new oil palm company is now encroaching into another part of the communities' NCR lands. This company is showing the same disregard towards the people's NCR lands and may be trying to bluff the people in a way similar to the other companies, the people have been in dispute with. The new company

has now begun work on the people's NCR lands. The people are facing shortage of lands for their own use to plant rice and other crops. Hill rice (*padi payak*) cannot be planted now as the land had been disturbed. 'Life has become more difficult with the oil palm scheme' concluded Beluka.

Bidayuh Dayaks of Kendaie, Pasir Hilir and Pasir Hilir Tengah

The Bidayuh, historically known as Land Dayaks, have inhabited the area of southern Sarawak from long before historical records tell.⁶⁰ The area has long been intensively settled and farmed and early on was integrated into regional and global markets, notably in the cultivation and sale of black pepper. Our research focused on the communities of Kendaie, Pasir Hilir and Pasir Hilir Tengah which are situated towards the extreme south and west of Sarawak, near to the border with Indonesian Borneo, Kalimantan Barat.

The communities are clear that they have acquired 'Native Customary Rights' over their lands in and around their respective villages, as they have occupied the same area since the time of their ancestors many generations back, and they have cultivated, dwelled in and occupied these lands ever since. They therefore consider themselves to be 'licensees' on the land within the meaning of the provisions of the Sarawak Land Code (Cap. 81).

As further evidence they point to a burial ground which exists within their Native Customary Lands, locally known as Kadih. Six generations of ancestors from Pasir Hilir have been buried in Kadih, namely Abeng anak Sinsen, Noren anak Metu, Metu anak Gulang, Budang, Jarari anak Metu and Mitir anak Juat.

Oil palm development commenced with the issuance of a Provisional Lease, over Lot 33, Block 11, in Gading Lundu Land District, to Syarikat Ladang Dafa Sdn Bhd, a large part of which overlaps the villagers' Native Customary Lands triggering a dispute. Although various meetings have been called by the relevant authorities to settle the dispute, they failed to find a compromise between the parties. The communities have not consented to their lands being developed by

⁶⁰ Geddes 1954; King 1994.

the company as an oil palm estate. However, despite community objections, since 1998, the company has cleared and/or damaged a substantial area of the people's Native Customary Lands and this area is now planted with oil palms. As plaintiffs, they now claim they have a right to their NCL as the source of their livelihood, which is being seriously threatened, and they have suffered loss and damages.

According to the interviewees, the background to the oil palm development on their lands is actually somewhat more complicated. To their knowledge, a provisional lease was initially issued by the Sarawak Government to a local company to plant cocoa, but this company soon went bust and was taken over by a new owner who then sold it to a former Chief Minister of Sabah. The lands were then planted with acacia trees. However, that enterprise did not last long either and it was finally sold to a West Malaysian-based individual,⁶¹ who then started the oil-palm scheme in 1997 until the present. Remarkd one interviewee: 'The company took the land as if it had inherited it from their ancestors.'



**Bakang anak
Sair of Kendaie village**

When the oil-palm plantation scheme's new owner took over, the disregard for local customs and traditions continued. The villagers were never informed of any of the schemes, since the first owner started clearing the lands in 1982. When the lands were first intruded on, the people made police reports. The police came to investigate the ruined crops. However, the police didn't do anything beyond that, except advising the people to deal with the company but not to use violence. With the oil-palm scheme, the villagers made efforts to meet with the new company on three occasions. However, the company officials could not answer the people's questions and instead, referred the people to the

⁶¹ This is according to the interviewees' understanding. The company may have more than one owner.

previous owner. The company was alleged to have said ‘we don’t know anything, we just bought over the land.’ Promises made by the company to build drains, bridges and roads never materialized. The people haven’t seen the management for the past 2-3 years.

The people also visited officials at the District Office, but they too, failed to resolve the situation. Although some officials did visit the area with the company, they never consulted the villagers. The District Office advised the people not to get involved in any fighting. For a long time the people did not know what channel to pursue to resolve their problems. Once there was no response from the company or the officials, they just kept silent. The elders who are involved in leading the dispute are illiterate, and they didn’t understand whatever documents were shown to them.

The Government did come to survey the land but since there was no information provided nor any consultation, the people were unsure about the details of what was determined. Therefore, the people resorted to conducting their own survey to demarcate their own Native Customary Rights areas. In line with their customs, the boundaries of their land are marked by grave yards, *engkabang* trees, fruit trees and rubber trees, many of which have now been entirely bulldozed away by the company. After the District Office and the government said they couldn’t do anything to help, the people persisted and sought the help of a lawyer to bring the dispute to court.

The villagers now feel that they did not put up enough of a fight in the initial stages of the dispute. They chose to abide by the rules and feel that, as a result, they were taken advantage of by the company which continued intruding on their land. Indeed the company only stopped working when the people stopped them physically, but they resumed operations as soon as they left – and the people could not be on the ground ‘24-7’. ‘Perhaps if the government had intervened in the first place, the problem might have been solved’, notes Bakang anak Sair, one of the members of Kendaie village and a plaintiff in the case.

Bidayuh Dayaks of Gumbang Asal Bau

The Bidayuh community of Gumbang Asal has a very long-standing case awaiting resolution in the courts. The case was filed in 1995 and their suit is against five different defendants, four being private sector enterprises, Rich Venture Sdn Bhd, Canto Resources Sdn Bhd, Dasaha Sdn Bhd and Lucky Logging Contractor Co., while the fifth is the Sarawak Land Consolidation & Rehabilitation Authority (SALCRA) itself. The case concerns three longhouses, Kampung Gumbang Asal, Kampung Padang Pan and Gumbang Redan.

The communities claim that they have communal native customary rights over lands surrounding their respective villages, an area which stretches from Plaman Turak in the north following a straight line towards the mouth of Sungai Angkosong (at the confluence of Sungai Angkosong and Sungai Pedi) to the east and on to the Bukit Sekam towards the Bungo mountain range, from where it runs along the watershed of the range to the Indonesian border in the south. To the west their boundary goes across to the mouth of Sungai Mekih and so up Sungai Mekih to the border line with Indonesia to the west. It then runs along the border to Sungai Pan on the west, following the ridge of Gunung Kisam back to Plaman Turak in the north. All these lands have been theirs since time immemorial and they use them for gardens cleared in virgin jungle, planting the lands with fruit trees, cultivation of crops and use of the lands as burial grounds. As such, they claim that these lands have been subject to Native Customary Rights long before the 1 January 1958 cut off date in the Land Code and the same were never extinguished by the relevant authority.

In the court case, the communities claim that the 1st, 2nd, 3rd and 4th defendants have trespassed onto the people's lands by constructing logging roads and/or feeder roads, extracting timber within the water catchment areas and/or surrounding hills and mountains without the plaintiffs' consent, causing much damage to the surrounding land or areas including their *temuda* lands, farms, fruit trees, their streams and rivers, their hunting ground and the forest in general which are the plaintiffs' source of livelihood. The 5th defendant, SALCRA, is accused of having commenced its agricultural scheme on the same land without the plaintiffs' consent. Despite several protests, official letters to the authorities concerned and despite a physical blockade, the companies have

refused to stop their activities and continue to trespass on the people's land. The plaintiffs claim that they have suffered loss and damages due to the acts of the defendants.



Duek anak Atin

According to Duek anak Atin, who is a plaintiff in the case, the District Officer of Bau did go with government agencies to inform the people of the oil-palm scheme. They explained on the merit of the oil-palm scheme, including the benefits to the local community. However, the quantum of payment was not explained. The dispute started when SALCRA started clearing the people's lands without informing the communities or consulting them about the ownership of the lands.

The people contested the oil-palm scheme as the area where SALCRA wanted to plant was a secondary forest area which still had lots of timber. Notes Duek anak Atin:

When they cleared the land, they informed the community, but they then felled and sold the timber. It was not discussed openly who should benefit from the timber.

The people then set up a blockade. Continues Duek:

The company that extracted the timber paid us M\$ 20,000 for the usage of our land as their log pond but the oil palm company has not paid us anything

There has been no effort from the government or company to resolve the matter. 'In discussion, they listen to our opinion but they did not act upon the discussion' says Duek. 'Our main grievance is the overlapping claim to land. The other complaint is that the scheme benefited Indonesia as most of the workers are from Indonesia.' As to the role of government in resolving the

dispute, Duek says ‘Other than meetings and discussions, there has not been any effort or help from the government.’

But Gumbang villagers are an organised lot. When asked about how the people bring issues to the attention of the other parties, Duek explained:

We formed a committee in the kampong and assigned representatives from the community to negotiate for us. We discussed it at the village level and the representatives from the community will approach the relevant parties.

The matter has since been brought to court and the people have now made their demands clear through a lawyer. As to what is his demand now, Duek answered plainly and simply

We want our land back.

Iban Dayaks of Lebor

The residents of Kampung Lebor call themselves *Remun* and it is their history that the *Remun*, *Sebuyau* and *Balau* Sea Dayaks were among the earliest Iban migrants into Sarawak from the Kapuas Basin in Indonesia. They legitimise their occupation of their current area first by reference to the long history that led them to move into the area long ago; second by reference to their historical relations with the Sultanate of Brunei to whom they paid tribute prior to the Brooke Raj; third by reference to various documents they have received from the colonial and post-colonial State bureaucracy; and fourth by the fact that they make extensive use of these lands for their livelihoods.

Their history is an elaborate one. From the Kapuas Basin, the *Remun* Sea Dayaks first settled in Upper Batang Ai, at Lubuk Baya and Tapang Peraja. They later migrated down river and settled at Bukit Temudok, to the south of present day Sri Aman. They lived in Temudok for many years before their chiefs Engkabi, Kekai, Bah and Banteh led them to migrate westwards. Those who stayed behind in Bukit Temudok and the surrounding areas are the present day Ibans known as *Undup*, *Dau* and *Balau* Sea Dayaks.

Engkabi, Kekai, Bah, Banteh and their followers migrated further and walked along the foot of Klingkang Range until they arrived at Sungai Krang. From Sungai Krang, Bah and Banteh led their followers and they proceeded towards interior of Melikin land where they built their longhouse at *Tembawai Munggang*. Some years later, Kekai and Engkabi together with their followers joined them at *Tembawai Munggang*.

After staying at *Tembawai Munggang* for some years, the group led by Bah and Banteh and the group led by Kekai and Engkabi had some misunderstanding and they decided to separate. Bah, Banteh and their followers stayed back in *Tembawai Munggang* while the group led by Kekai and Engkabi decided to move to another area.

The group led by Kekai and Engkabi came to Nanga Kedup where they met Damu and Panjang and were told that no one had ever ventured into that part of the country called Sadong before them. Leaving behind Damu and Panjang they walked towards Bukit Simuja. When they reached Bukit Simuja, they heard the sound of the waterfall. This waterfall, later known as *Pancho Asu*, is located in the Upper Sungai Remun.

They climbed up the Bukit Remun and reached a place known as Salapak, where there were abundant fruit trees. This is the area where *Durian Madu* is now. They decided that they would settle there but returned homeward to *Pancho Asu* waterfall. Later on, they held a meeting among their followers and friends. They agreed to move to another place not very far away. When all the preparations were finished, Kekai and Engkabi led their followers by boat to the new land.

They proceeded down Sungai Krang until they came to the mouth of Sungai Engkuan, a tributary of the Krang River. They went up the Engkuan Stream until finally they reached Nanga Remun. They continued their journey until they reached the landing place at the foot of Bukit Remun (of the Ampungan Range) near a river. On first arriving at the landing place they heard a bird calling '*remun, remun, remun*' from atop an unfamiliar tree. Having scared it off, they observed that it promptly returned to the same spot. So the tree was called

'*remun*', the stream was named '*Sungai Remun*' and from that time on, the settlers called themselves '*Remun*' and built their longhouse there. After some years, Kekai and Engkabi journeyed in the direction of the Samarahan area to examine the land. On their journey back, Kekai died on top of a hill and was buried there. Subsequently the hill was named after him, Bukit Kekai, a place near Serian Bazaar.

From the original longhouse of Kampung Remun, some residents moved to open up land further north, probably a hundred years ago. It was also at that time that the Remun were attacked by other Ibans and this occurred while the men were working in their farm, away from the kampung, leaving the women and children unprotected. They were killed. The shock of this devastation was reflected in the name of the resurrected village – Kampung Lebor (*destroyed*). However, some villagers chose to remain at this early settlement of the Remun – at the landing place at the foot of Bukit Remun and they still retained the old name Kampung Remun.

During the same period, another split resulted in the birth of Kampung Triboh. These three settlements remain the cultural core of the Remun community today. No further resettlement has occurred in living memory. There are presently at least 13 Remun villages scattered across a band centring on and following the Serian–Sri Aman road between Serian and Balai Ringin.

From probably the early 19th century during the reign of the Sultan of Brunei until today, Remun were under the leadership of the following leaders – Orang Kaya Sajo; Orang Kaya Baga; Orang Kaya Daka; Orang Kaya Nyaun; Orang Kaya Dipa; Orang Kaya Lidang anak Girang; Penghulu Chunda anak Gengchang; Penghulu Paja anak Banyang; Penghulu Nyungan anak Tindin; Penghulu Sinja anak Beti; and Penghulu Untulus anak Jangeh. The first six Remun chiefs were given the titles Orang Kaya – an honour given by the Sultan of Brunei. When Sarawak was under the British, the Dayak headmen were given the title Penghulu. The title Penghulu is also applied by our government today. Out of the 11 Remun Chiefs, 6 Orang Kaya and 2 Penghulu were residents of Kampung Lebor.

It is Remun Iban Dayak oral history that since the early 19th century and during the reign of the Sultan of Brunei, the Remun or Melikin Sea Dayaks paid yearly *hasil* (tribute) to the Sultan. During the time when Orang Kaya Sajo was Remun Dayak Chief he paid a visit to Brunei to pay *hasil* and he was given by the Sultan of Brunei a handful of *Tanah Keramat* (Sacred Soil). That was a symbol that they were the subjects and under the rule of the Sultan of Brunei. It was because of this that the *Guna Gayau* was created. The *Guna Gayau* is at a site about 4 kilometres from Kampung Lebor. The heart of *Guna Gayau*, designed and made to look like a crocodile, was made from the *Tanah Keramat* that was given to Orang Kaya Sajo by the Sultan of Brunei.

In the early days, the annual *hasil* paid by Remun ancestors to the Sultan of Brunei was in the form of *Ai Pinang* (pinang juice). Pinang is a type of palm tree and the oval shape *buah pinang* (nuts) yield a small quantity of juice that is sweet when the nut is young. It was understood that during that time, people had to fill one “*mandoh*” (jar) of *Ai Pinang* and bring it to the Sultan of Brunei each year.

Many titles such as “Rubber Tickets” (*New Planting Permits issued by the Rubber Regulation Department Sarawak*) were also issued to the residents of Kampung Lebor. These are further evidence that the people had acquired Native Customary Rights over the land along both banks of Sungei Tampoi, Sungei Krang and Sungei Meringgang.



Jingga of Kampung

The basic facts of the communities' complaint are quite simple. In mid 1996, the Land Custody and Development Authority (LCDA) and Nirwana Muhibbah Sdn Bhd were issued parcels of land which overlapped with the Remun Dayaks' Native Customary Lands. In mid 1997, the LCDA and the company and/or their agents or servants with the aid of bulldozers and lorries destroyed and damaged the communities' lands near Sungai Tampoi and Sungai Krang, an area designated as Lot 166, Block 5, and planted oil palm seedlings.

The communities claim that this caused extensive pollution and silting of Sungai Tampoi.

The communities claim they have suffered a serious breach of their rights. There was no prior extinguishment of their NCR over the lands; and no compensation was paid. The Remun Dayaks claim they have suffered loss and damages in the destruction of their source of livelihood; extensive erosion and damage to the land; and extensive pollution and silting of rivers. The community filed suit against the company, LCDA and the State Government on 24th November 1998. The case was finally heard in 2006 and is now awaiting judgement.

As related by community members the details of the situation that led to the court case are again somewhat more complex. First and most importantly, the people understand their Native Customary Rights as extending not only over their farmlands but also their areas of forest fallow (*temuda*) and over the wider territory (their *pemakai menoa*) which they use for hunting, fishing, gathering, obtaining timber and other constructional materials like rattan. The *pemakai menoa* is mainly primary forest.

The company first entered the affected villagers' NCR lands in 1996, together with two government elected representatives and the oil-palm company manager, to inform the community of the impending oil palm scheme. They informed the community that they would allocate one hectare per family of planted oil-palm, a promise that they later renege on. As of today, no land has been given back to the community.

Moreover, in preparation for the planting no effort was made by the government or by the company to identify the people's NCR lands. Although it appeared that they did recognise the people as having NCR in the area, as they had promised to allocate 1 hectare per family of planted oil palm, they did not make any effort to identify which lands belonged to whom and what was the full extent of the NCR before they started to clear the lands. In addition, initially they promised to compensate those affected lands and pay for any crops and fruit trees in the area. The oil-palm scheme affects more than 4,000 hectares of NCR land claimed by the community.

During the initial briefing by government representatives and the company, the villagers were given the “choice” of not joining the scheme. If the villagers declined, their land would not be developed. Initially the villagers agreed to the scheme but after they found out that the company had not delivered upon the promises, the people rejected it.

When the company cleared the land and felled all fruit and crop trees, they did so without informing the villagers and thus the community had no record of the number of trees and was unsure of the size of their individual holdings as the boundaries were marked with trees, streams and so on and was not recorded on paper. When the community inquired, the company said that the land belonged to the company. Without any compensation paid for damaged crops, the villagers realised that promises were not being kept. The community then had a discussion and agreed that the matter should be brought to court.

The community people knew that the oil-palm scheme did not comply with the native law. ‘They just came and took our *temuda*’ was how Jingga described the intrusion of the company onto the communities’ NCR lands. In 1997, the company was requested to pay a fine, according to customary law, for trespassing but they never paid their fine or acknowledge their wrongdoing. Notes Jingga:

The law recognises our NCR over our *temuda* but the company just took our land. They robbed us of our land, lied to us and reneged on their promises.

The community contested the scheme as early as 1997 when the company started planting. Blockades were set up by the people, explains Jingga:

The company has been very uncooperative in negotiation and has hired thugs to scare us. After the people made police reports, the police did not take any action, so we set up the blockade. The police then called the company and villagers together and held a discussion at the police station. The company had agreed to pay but that did not happen. The District Office which was represented at the meeting also agreed that the community be paid. However, when the District Office had been approached by the people

beforehand about the main dispute over land rights, he said the people couldn't fight against the government.



Segan anak Degon

Segan anak Degon, a member of the Village Action Committee on Land Rights, clarifies:

We explained to them that the land was felled by our forefathers. They then offered to buy our lands at M\$300 per acre. We replied that if the price of land was only M\$300 per acre, we wanted to buy the land from the company.

The company also tried to collect toll from community people when the latter used the oil-palm road to reach their lands. The matter was reported to the District Officer who refused the request of the company.

The people felt that there was not enough information provided by the company or government. As Segan explained:

They never explained the duration of the oil-palm scheme and they never informed the community people about our share. After we found out that they had reneged on their promises, we would only talk with them in front of the DO (District Office) or the police.

Asked what they now want as a resolution of this problem, Jingga replied:

We do not want any compensation. We only want our land back.

As for Segan:

There is no price for NCR lands because there are no other lands.

Concluded Jingga:

If we know our rights, there is nothing to be scared of, [still] it is very hard to protect our lands.

Iban Dayaks of Sungai Bawan

The final case summarised here concerns the Iban of Sungai Bawan near Balingian in Mukah Division, which involves a large number of communities affected by one of the earliest oil palm schemes in the State. The communities are: Rumah Ladon, Rumah Tangkun, Rumah Jabo, Rumah Atang, Rumah Nyaun, Rumah Budin, Rumah Madak, Rumah Malang, Rumah Enjan, Rumah Ketip, Rumah Muda, Rumah Langgi, Rumah Empaling, Rumah Nyamun, Rumah Mak, Rumah Jabdang, Rumah Lanyau, Rumah Munggang, Rumah Sebeli, Rumah Lamie, Rumah Jungan and Rumah Selai.

In 1973, the plaintiffs and their parents and grandparents were informed that their Native Customary Lands had been earmarked for a pioneering oil palm plantation scheme to be carried out by the government. The communities understood that they had been given an assurance that the implementation of the pioneering project was based on an official guarantee that their ownership of NCR land would not be in any way impaired, abridged or negated while at the same time the land could be developed for the welfare and benefit of the landowners.

In 1975, a payment of *tasih* of M\$ 50.00 per acre for the usage of NCR land for a 25-year period was made to the individual landowners; excluding certain patches of unsuitable lands such as low-lying swamps, and economically and socially important areas such as rubber gardens, cultural and historical sites, *tembawai*, *pulau* and *pulau buah* (various kinds of economically important natural and planted forests). The leasehold (*tasih*) should thus have expired in 2000, and the NCR land should then have been returned to the plaintiffs.

However in 1989, without the knowledge and consent of the people, the Government issued a further 'Provisional Lease of State Land', described as Lot 2, Bawan Land District, which extends over the people's longhouses and former longhouses, burial grounds, personal and communal lands, to the SLDB. Yet there had been no negotiation with the people, no discussion about compensation nor any measures taken to extinguish their rights in accordance with Sarawak Land Code. A suit was filed against the SLDB, the Superintendent for Lands and Surveys for Mukah Division and the State Government of Sarawak in March 2006. This case is now at an interlocutory stage.

As a people whose traditions are passed on from one generation to another by oral means, stories are told and retold over time and key events, issues, personalities and so on are constantly relived. The Ibans of Sungai Bawan continue that oral tradition and ensure that their history and their ancestors' past live on for those yet to come.

Such is the people's way of life and integral to that are their NCR lands which are, among other things, both their livelihood and their maps. Instead of being a mere two-dimensional map of lines, shades, symbols and words, the people's maps are filled with the dead, the current generations and the future ones yet to come. However, as the court documents showed, and as Ambun tells us in his community's story, generations of continuity, rights, history, traditions and customs are under threat at the stroke of a pen - the issuing of a provisional lease to companies to destroy all on the lands, to be replaced with oil-palm crops.

The affected communities first had to deal with a Sarawak Government land development agency, Sarawak Land Development Board (SLDB). When the first scheme of the SLDB approached the people in 1970s, they respected the people's native laws and conducted rituals according to the people's *adat* (customary laws) to obtain consent for use of the land. The people then allowed the scheme to use some of their communal lands on the higher grounds, while the lower fields and other areas were kept for the people's own farming and livelihood purposes.

However, before the expiry of the first agreement between the SLDB and the community people, the court documents show that the Sarawak Government then issued this new provisional lease in 1989 over an area which effectively covers all the various communities' NCR lands, including the people's places of residence. And this time round, no information was provided to them nor was there was any consultation with the affected people.

Ambun anak Ladon, son of the headman Ladon anak Edieh explained the situation:

When the new scheme re-entered we were unaware. We only learned that before the expiry of the first agreement the lands were planted with new oil-palm seedlings. We received no information on the new scheme. We were not aware of the switching of ownership from the first one. The new scheme owners even tried to hide from us their identity. We sent letters (three times) to the company but we did not receive any response. Their site office refused to talk to us with the excuse that they did not hold the authority. Only after our blockade, we got an arrangement by the police for a meeting in 2006 with the manager of SPAD at a hotel in Sibu, some 130 km from our community.

Ambun reiterated the fact that in the initial scheme, before the first entry, a land perimeter survey was conducted by the SLDB with the people's consent. The communities' NCR were recognized, in the sense that the scheme paid a lump sum of M\$50 per acres for 25 years. The people generally agreed with the boundaries identified.

We are protesting the present new scheme which re-enters without our consent.

Under the new scheme, the new company, Sarawak Plantation Agriculture Development Sdn Bhd (SPAD), holds a license to expand the initial SLDB-developed oil-palm scheme. The community people were shown a copy of the license when they confronted the new company. The people then decided to object to the new company taking over the oil-palm scheme and continuing with the replanting. Explains Ambun:

We approached the plantation site office before the expiry of our first agreement to request the return of our lands, and only then we realized that the plantation had changed management. Our letters were ignored because the office did not represent the former company any more. We then carried out a protest by blockading the entrance of the plantation to stop the company from transporting palm fruit out of the plantation. A new sign board of the new company, SPAD, was then erected.

Ambun remembered that the blockade started in November 2005 and lasted till March 2007 when a temporary agreement was reached with the mediation of the police. During the blockade, police came twice and they had men stationed at the blockade site for 3 months. Then eventually, the community people filed a civil law suit against SLDB in early 2006. However, the new company SPAD followed with a counter suit against the community people's protest.

The people had to object to the continuation and expansion of the new oil-palm scheme since the scheme encroached solely on the customary rights land belonging to the members of 22 longhouses, which total some 9,000 acres.

The streams which we used for transportation and washing purposes, as well as source for drinking water, are silted, blocked and polluted. The new scheme took away our lower ground farm land that we used for farming. Even our cemeteries are surrounded by the palm without respect.

As to whether the community people had free choices to accept or reject the oil-palm scheme, Ambun said:

We were not offered any option if any of us wished to take back our land. The pressure was laid on us in a somewhat secret manner. Even for the first scheme, since it was a state agency we somehow felt obligated to the authority.

As far as Ambun is concerned, his people just want to take their lands back under their own use and control.

In his reply to the question on whether the oil-palm company or its agents/workers ever discussed and or consulted the people on the scheme, Ambun said:

At the earlier stage we were given jobs with the plantation between 1975 and 1986. Then the management was handed over to Sime Darby, a private firm and jobs were gradually taken over by Indonesian migrant workers, especially since 1992, when land owners were laid off. Then in 1994, we wanted to discuss a new assessment on the use of our NCR lands according to our customary practices with the intention to take back our land.

Ambun made clear in the interview that no process was ever made known to the people or otherwise in which any complaints and grievances could be dealt with. Instead, the people had to resort to going to the company's site office but they had no idea who holds higher authority or where the company's main office is.

In addition to the lack of information, secrecy and non-accountability in the entry of the new company onto the oil-palm scheme, the people had also pursued other matters. This included asking the company to reassess the rent for the re-entry but that was ignored.

The people kept records and copies of letters that had been sent to various parties and only took action to block the operation when their complaints fell on deaf ears. Then they made reports to the police before taking up the legal suit. The police arrested some of the community people for their protest action in harvesting the palm fruit for sale. However, those arrested were later released without conditions since the people considered their actions to be harvesting crops from their own land.

Asked what the Sarawak Government had done when the people had sought to assert their rights with the private company, Ambun noted:

After we set up the blockade, the district office did arrange a meeting with SPAD representatives in the presence of area community leaders, the Penghulu and Pemancha. The office told us not to blockade. There were two ruling party politicians who approached us during the last state election in

2006, attempting to resolve the problem but actually they came to persuade us to accept the scheme as it would provide us with jobs. They told us that there was no way to get back our NCR lands.

In regard to whether there was any discussion on compensation for use of NCR lands, Ambun noted:

In the meeting arranged by the police with the manager of SPAD, they did offer us a temporary agreement for a monthly payment of M\$ 17,000 from March 2007 onward until the court ruling.

But Ambun was quick to qualify that this was not fair compensation according to the people.

The first rental of M\$50 per acre for 25 years means only M\$ 2/acre per year. Even the current agreement of M\$ 17,000 per month for the 9,000 acres is a very small amount of compensation or less than M\$ 2/acre per month.

Ambun sums up what the people want:

We want our land back under our own control. We must get our people together in a collective action to pressure for a negotiation. There is no other way that we know a fair negotiation would come about.

8. Sarawak and the Roundtable on Sustainable Palm Oil

The Roundtable on Sustainable Palm Oil (RSPO) is an international initiative aimed at promoting the development and trade of palm oil produced to globally acceptable standards of business practice in line with international standards and laws. Set up by the world's main palm oil producers, processors, retailers and investors, the RSPO includes non-governmental organisations in its Board, membership and standard-setting committees with expertise in conservation, the environment, social development, labour practices, land tenure and human rights.

Two years ago, the RSPO adopted at its General Assembly a set of Principles and Criteria for the production of palm oil, which requires companies to respect national and international laws, cease clearing primary forests and areas of high conservation value, respect customary rights, acquire land only with the free, prior and informed consent of local communities and indigenous peoples, observe international labour standards, control waste and pollution, and limit the use of agrochemicals (see Annex 1 for the full standard and next page for the key criteria related to land acquisition).

This year the RSPO also adopted a 'certification protocol' setting out how palm oil estates and mills should be assessed against this standard by accredited independent third-party auditors. The RSPO membership already includes companies representing over a third of the world trade in palm oil and is fast becoming accepted as setting the industry standard for responsible palm oil production. It is anticipated that RSPO certified palm oil could be on the market as early as April 2008.⁶²

⁶² For details see www.rspo.org

Will any of that palm oil come from Sarawak? Are estates in Sarawak operating to RSPO standards? Is the Government of Sarawak seeking to reform the oil palm sector in Sarawak to bring it up to an internationally acceptable standard?

The findings of this study are not encouraging.

Respect for customary rights

The RSPO standard requires that palm oil estates respect the customary rights of communities and that estates' licences are not being legitimately contested. However, the Government of Sarawak seems to be pursuing a strategy of severely limiting the recognition of customary rights of Dayaks and other rural peoples. On the one hand, through a restricted interpretation of the law, the Government seeks to limit 'Native Customary Rights' to areas which were established before an arbitrary cut off date, often cited as 1st January 1958. On the other hand, the Government has done very little to inform communities or companies which areas it does recognise as being NCR lands within the limited definition it asserts (see Chapter 3 above). Thus, even though the great majority of rural communities in the State regulate their access to lands in line with customary laws, the Government has failed for over 40 years to provide clarity or security about the extent of these customary rights.

The Government of Sarawak's limited interpretation of the extent of customary rights is at odds with the perception of the communities themselves. Communities interpret their customary rights areas as being all those areas that they have rights to according to customary laws including their cultivated lands, gardens, burial sites, sacred sites, communal forest reserves and the bounded virgin forests which they use for their wider livelihood activities and to allow for future expansion. The Government's limited interpretation of customary rights is also contrary to the repeated findings of the courts in Sarawak and Malaysia, which have upheld a much wider understanding of customary rights. The government's limited interpretation is also contrary to international law and to the standards of the RSPO.

Main RSPO Principles related to land acquisition

Criterion 2.1 There is compliance with all applicable local, national and ratified international laws and regulations.

Criterion 2.2 The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights.

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.

Criterion 6.2 There are open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties.

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.

Criterion 6.4 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.

Criterion 7.5 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.

Criterion 7.6 Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements.

Not legitimately contested

As a direct result of its restricted interpretation of the extent of customary rights, companies are being given leases for oil palm development over supposedly 'vacant' and 'idle' State lands, which are, in fact, quite obviously inhabited,

encumbered with customary rights and being actively used by local communities in their daily lives. The result is that most palm oil projects are contested by local communities. At least 40 of these projects have now been taken to the courts by communities seeking to defend their rights. Dozens of other schemes are being contested locally by communities who do not have the ‘know how’ or contacts to find legal representation.

Open and transparent methods for communication and consultation

The cases examined above, as well as those reviewed in academic studies, show a persistent failure on the part of government agencies and companies to provide clear information to local communities about the projects planned for their lands. Leases are being handed out to companies without communities being informed. Operations commence on community lands prior to discussions with community leaders and members.

Affected villagers are not being given copies of essential and basic information relating to the projects such as maps of licensed areas, the terms and conditions of licences or leases and other information relevant to the projects. Thus, in all too many of the cases mentioned above, the villagers and or landowners were usually taken by surprise to see companies’ bulldozers moving in. Leases are also being extended and handed on from one company to another without the companies or the Government letting the communities know what is going on.

Free, prior and informed consent

The free, prior and informed consent of indigenous peoples to activities planned on their lands is a requirement of international law.⁶³ The recently adopted United Nations Declaration on the Rights of Indigenous Peoples, voted for by the Government of Malaysia at the UN General Assembly in September 2007, states in Article 32(2):

⁶³ Colchester and MacKay 2004.

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, utilization or exploitation of mineral, water or other resources.

Consent is also meant to be a requirement of projects developed through SALCRA and under the *Konsef Baru*. However, based on the experience of the above-mentioned villages, this principle does not seem to be observed. Not only are affected villages not informed adequately about proposed activities, but some activities are starting without any kind of consultation. Even when communities protest or raise objections with the relevant authorities, or even in the courts, schemes go ahead regardless.

Operations far from being based on ‘free’ consent, are being pushed through by the use of intimidation and other forms of compulsion. Community leaders or longhouse chiefs who oppose projects are told that they would lose their positions or appointments. They are urged to convince their people to support the projects.

Represented through their own representative institutions

In their ongoing effort to assert and protect their customary lands and properties, villagers and longhouse communities still rely upon their long established traditional institutions, such as their headmen and community decision-making forums but have also set up new bodies to defend their interests such as land or longhouse associations and longhouse development and security committees. Normally, the government and the companies only deal with the communities through village headmen and, as noted, in some cases where leaders have stood up for their communities’ interests in defiance of the imposed plans, they have been removed from office.

Fair compensation and negotiated agreements

A common complaint registered in the cases examined is that rates of compensation for damage and destruction to lands and crop or forced occupation and usage of native customary rights lands by the companies is usually determined by the companies themselves, without reference to the affected landowners. In some cases, no compensation for loss or damages has been paid at all. In other cases, the payments have been nugatory, even insulting. In many cases, payments have only been made after communities have been forced to resort to direct actions, a short sighted approach which only serves to exacerbate conflicts in the longer term.

Participatory social impact assessments

Under Sarawakian law, larger development projects such as oil palm schemes do require Environmental Impact Assessments (EIA). However, the preliminary EIA studies that are conducted prior to the implementation of such projects are usually done by EIA consultants appointed and or engaged by the plantation companies. It is not surprising therefore to see that the reports conclude with recommendations for the project to go ahead and are usually approved by the authority without having to undergo public review or scrutiny.

Social Impact Assessments are only done as a supplementary part of the EIAs and the views, interests and concerns of the local communities affected by such projects are not thoroughly addressed and given serious consideration. Too often, the purported benefits and the justification for the projects to proceed are emphasized without taking into account the serious adverse implications of such projects on the very sustenance of the affected communities both in the short term and long term.

Indeed the credibility of EIAs in Sarawak is widely questioned by NGOs. The Government of Sarawak is on record for declaring that EIAs should **not** be subject to public review, claiming that overview by the State Planning Unit and the Sarawak Land Development Ministry is 'adequate'. 'If the EIA study goes for public review, then it might be difficult for the project to proceed', the

controller of Sarawak's Natural Resources and Environment Board has stated, adding that people in rural areas do not have a high level of education and can be easily manipulated by 'certain' non-governmental organisations.⁶⁴

Open means of redress and handling of complaints

Companies themselves appear to lack established mechanisms for handling complaints and grievances. As a result affected villages usually go to District and Resident's Office to bring up their problems resulting from the company's operations or upon hearing of the areas to be affected. In some cases, the villages have to approach the Land and Survey Office to find out about the extent of the licence area. There are instances where the Resident and District office coordinated dialogues or meetings for the various parties to negotiate but because the issuance of licences is done by the Ministry, too often the negotiation did not bring a positive and/or a fair outcome.

A number of disputes have also been taken to the 'Native Courts' as a means of seeking redress. However, even where these courts have made decisions in favour of the communities, this has done little to change the behaviour of the companies. This has obliged communities to press their cases through the civil courts.

Although it is an encouraging aspect of the situation in Sarawak that communities do feel they have recourse to the courts to seek redress, the very long periods that they then have to wait before they get a hearing is a matter of concern.

Key oil palm planters in Sarawak

The main agencies active in Sarawak in the palm oil sector, which we have been able to identify for this study, are the following:

⁶⁴ The Borneo Post Online, 9th October 2007: <http://www.theborneopost.com/?p=25904>

State agencies

1. Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) (45,229 ha, as of Dec 2004).

- Bau Lundu region: Sebako Oil Palm Estate, Undan Oil Palm Estate, Jagoi Oil Palm Estate, Stenggang Oil Palm Estate, Bratak Oil Palm Estate (12,085 ha)
- Serian Region: Taeo Oil Palm Estate, Kedup 1 Oil Palm Estate, Kedup 2 Oil Palm Estate, Mongkos Oil Palm Estate, Melikin Oil Palm Estate (10,789 ha)
- Sri Aman Region: Pakit Oil Palm Estate, Sedarat Memaloi Oil Palm Estate, Lemanak Oil Palm Estate, Batu Kaya Oil Palm Estate (11,244 ha)
- Saratok Region: Saribas Oil Palm Estate, Saratok Oil Palm Estate Roban South Oil Palm Estate, Roban North Oil Palm Estate (11,111 ha)
- Processing and Storage: Lubuk Antu Palm Oil Mill, Bukung Oil Installation, and Saratok Palm Oil Mill (Joint Venture with PPB Oil Palms Bhd)

2. Sarawak Land Development Board (SLDB), incorporated in 1997 as a private limited company through Sarawak Plantation Berhad or SPB and converted into a public company in 2000 (13 oil palm estates with a concession of 32,805 ha)

- Northern Region: Bukit Peninjau, Ladang Surea, Sungai Tangit, Ladang Tiga, Landang Kosa, Subis 2, Subis 3, Sawai – NCR land (18,986 ha)
- Central Region: Mukah 1, Mukah 3, Sri Duan, Melugu, Tulai (13,819 ha)
- SPB owns two mills: Mukah Palm Oil Mill (60MT/hour) and Niah Oil Palm Mill (120MT/hour)

3. Land Custody and Development Authority (LCDA)/Pelita Holdings Sdn Bhd (65,527 ha of all types JVC, as of Jan 2006) is involved in developing 27 plantation projects under the NCR land with a land bank of 189,000 ha as well as 25 Projects under state land with a land bank of 222,000 ha. The JVC between LCDA and the investor is based on 40:60 percent of equity participation (see also *Konsep Baru* above).

Private agencies - RSPO members

Boustead Plantation Berhad (formerly known as Kuala Sidim Berhad, owned subsidiary of Boustead Holdings Berhad)

- Logan Bunut Plantation (10,000 ha, JVC, Miri, 1994)
- Boustead Pelita Tinjar Plantation (12,751 ha, Miri)
- Kanowit Oil Palm Plantation* (82,730 ha, NCR-JVC at Durin-Kanowit-Nanga Ngemah, Sibul)

Golden Hope (total 190,000 ha)

PPB Oil Palm (13 plantations 142,000 ha in East Malaysia and Indonesia)

Sime Plantation

Private agencies - Non RSPO members

Rinwood Oil Palm Plantation Sdn Bhd (ROPP) JVC with LCDA

- Rinwood Pelita Plantation (RP Miri), Tinjar and Dulit, 9,000 ha
- Rinwood Pelita Mukah Plantation Sdn, Mukah 24,000 ha.

IOI Corporation Bhd (which has plans to expend to 1 million ha in the next five years, 2006), 70% equity interest in Rinwood Pelita Miri Plantation. IOI also own an oil palm mill with a capacity of 90 tonnes of fresh fruit bunches per hour.

Glenealy Plantation (Malaya) Bhd (4,078 ha, as of 2006, Lana estates)

Sarawak Oil Palms Berhad (SPO) (27,417 ha)

SOP subsidiaries:

- Ebal Plantation Sdn. Bhd.
- SOP Plantations (Niah) Sdn.Bhd.
- SOP Plantations (Borneo) Sdn. Bhd.

(Dec '05 entered into a joint venture agreement with Shin Yang Holding Sdn. Bhd. To develop 10,387 ha in a JVC via Danum Jaya Sdn Bhd or DJSB)

Other Private and Joint Venture Corporations (incomplete list)

Northern region

- Austral - Ladang Baru*
- Bakun Oil Palm Plantation*
- Beluru Oil Palm Plantation (Kina Juara Sdn Bhd)* (6,841 ha, Miri)
- Grand Mutual Oil Palm Plantation*
- LCDA
 - Genaan Sebauh NCR land (13,000 ha) JVC with Mutiara Hartabumi
 - Tutoh Apoh NCR land (16,000 ha)
- Majrany Oil Palm Plantation*
- Pelita Diwangso Oil Palm Plantation (3,000 ha, Bintulu)
- Pelita Splendid Oil Palm Plantation (1,190 ha, Miri)
- PJP Pelita Long Lama (5,000 ha, Miri)
- Oxford Glory Oil Palm Plantation *
- Samling Oil Palm Plantation*
- Sarawak Oil Palm (43,673 ha, Miri)
- Shin Yang Oil Palm Plantation*
- Southwind Oil Palm Plantation*
- Tapung Haji - Ladang Sawait Bintulu*
- Tung Huat Pelita Sebakong (7,911 ha, Miri)
- Tung Huat Pelita Tinjar Regalot (774 ha, Miri)

Central Region

- Amalan Pelita Pasai Plantation (14,000 ha, Sibul)
- BLD Oil Palm Plantation
- Delta apelita Sebakong Plantation (7,000 ha, Mukah)
- FELCRA Pelita Jemoreng Plantation (4,677 ha, Daro)
- Hua Seng Oil Palm Plantation
- Jaya Tiasa – Eastern Eden Sdn Bhd (10,000 ha, Bruit Land District, Mukah)
- Fame Majestic Sdn Bhd
- KTS Agriculture Oil Palm Plantation

- LCDA- Mato Daro Oil Palm Plantation (4,677 ha, organic peat soil, subjected to logging by 2 timber companies, at Mato-Daro, Mukah)
- Lemasan Sdn Bhd
- Lower Rajang Oil Palm Plantation
- Majestic Vest Sdn Bhd
- MPI Pelita Mukah Plantation (4,630 ha, Mukah)
- MSB Pelita Mukah Plantation (2,300 ha, Daro)
- Mukah-Balingian Oil Palm Plantation (5,160 logged over forest at Boluh land district within the (*Hutang Simpang*) reserve forest Lemai, Mukah)
- Multi Maximum Sdn Bhd
- Palmcol Sdn Bhd (5,446 ha, peat swamp secondary forest, NCR-JVC, Ladang 5 and Ladang 6 at Mukah Road 35km from Mukah)
- Pelita Holdings Sdn Bhd
 - Dalat & Sibu Plantation (11,980 ha, peat swamp forest, project site was part of the (*Hutang Simpang*) reserve forest formerly, now mixed zone land owned by Pelita)
 - Wak Pakan NCR Oil Palm Plantation (5,500 ha, Sarikei)
- Retus Plantation Sdn Bhd*
- RH Forest Corporation Sdn Bhd – Loba Kabang Oil Palm Plantation (30,500 ha, logged over peat swamp forest LPF/0029, at Batang Lassa, Sibu)
- Rosebay Enterprise Sdn Bhd (299615-D) (4,660 ha, logged-over forest concession owned by Lien Ho Sawmill Bhd T4214, at Selangau, Sibu, has a dispute with local community of 10 Iban longhouses of Pelugau)
- Saujaya Mahir Oil Palm Plantation*
- Sinong Pelita Matu Plantation (4,267 ha, Daro)
- Ta Ann Pelita Igan Plantation (9,200 ha, Sibu)
- Tradewinds Plantation Services Sdn Bhd - Ladang Pasai Siong* (11,500 ha, licensed for timber extraction on a re-entry basis, swamp forest dominate most of the area, at Pasai Siong, Sibu)
- Ulu Selangan Oil Palm Plantation – Ladang Hijau (Sarawak) Sdn Bhd (1,000 ha, at Ulu Selangan, Batang Mukah)
- Wealth Houses Development Sdn Bhd – Lot 264 of Bruit Land District (6,000 ha, Mukah)

Southern Region

- DD Pelita Gedong Plantation (7,250 ha, Simujan)
- DD Pelita Sadong Plantation (3,880 ha, Simujan)
- PJP Pelita Biawak Plantation (3,933 ha, Lundu)
- Raya Ceria Oil Palm Plantation*

* Companies reported to have violated Environment Protection Laws by open burning in 1999, as revealed by satellite technology, *Malaysia Daily* 15/08/99.

9. Ways Forward

A prior grant of title to claimants would serve the interest of the vulnerable owners and the sense of security would be an incentive for participation.⁶⁵

This report has sought to clarify the difficult situation being faced by Dayak communities in Sarawak when confronted by State-backed efforts to promote palm oil development on their lands. As the testimonies collected in this study make clear, Dayaks are not opposed to all forms of development, but what they seek is a model of development that respects their rights in land and builds on their heritage, culture and ways of life and above all which gives them the right to choose what happens on their lands.

Unfortunately, the current land tenure laws and land development schemes do not provide a good basis for this kind of development. Through restrictive laws, which are at odds with people's rights under customary law, community rights in land are interpreted in very limited ways and State agencies are giving companies access to customary lands contrary to the will of the communities and without providing either fair compensation or adequate means of redress.

Denied alternative means of redress, communities are being forced to sue the Government and the companies in the courts. Some forty cases against palm oil companies have been identified in this study and we have learned that further submissions are pending. Yet, already, a serious backlog of cases has built up, and, although a number of cases have been settled out of court, the delays are still considerable, implying a huge wastage of time, resources and effort by community members.

Encouragingly, recent cases have firmly upheld customary law and native people's rights in land and have shown, in effect, that the Sarawak government's limited interpretation of customary rights is flawed and

⁶⁵ Bulan 2006:61.

inadequate. It is urgent that the government now moves quickly to amend the Land Code and other relevant laws in order to uphold the Federal Court's interpretation of native customary rights.

To fail to do so, will only serve to perpetuate the ongoing conflict over land. This will not only imply continuing harms to the local communities but will also imply continuing and significant risks for companies and investors, the profitability and sustainability of whose oil palm schemes are thus in doubt.

The report's findings will also be worrying to those who are investing in and purchasing palm oil in line with the voluntary standards that have been developed by the Roundtable on Sustainable Palm Oil (RSPO). As the previous chapter has detailed, it seems clear that many oil palm schemes are being developed on customary lands in Sarawak contrary to the principles and criteria of the RSPO. This may well mean that Sarawakian palm oil is unlikely to get certified by independent auditors as meeting the RSPO standard and so will not be marketable as 'Sustainable Palm Oil'.

Recommendations:

The most immediate actions that the Government of Sarawak needs to take is to overhaul the laws relating to land tenure to give effective recognition to customary rights as protected by the constitution, as understood by native communities and as upheld in the courts.

The Government should also establish formal committees between companies and communities, in which all the dos and don'ts are made clear, with communities empowered to know all details and be in the position to participate as equal partners.

The Government should also institute mechanisms to ensure that compensation, if and when agreed to by the community people as a condition before the start of any oil-palm scheme, must be based on market rates, not government-decided rates and an arbitration process is built in to resolve any disagreement.

As land matters fall under the jurisdiction of State Governments, oil-palm companies must insist that the government demonstrates proof of indigenous land owners' consent and verify this by initiating further consultations with the communities before any scheme can proceed.

In addition, the companies must make known detailed plans as to how the companies propose to consult with indigenous land owners to obtain their consent before the start of any oil-palm scheme.

It is also suggested that a register is instituted to publicise cases in which companies have rightfully recognized and respected indigenous land rights and those which blatantly and knowingly disregarded indigenous land rights.

Communities must be empowered to seek third party advisers of their own choice to aid and support them in any negotiation.

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Annex 1:

RSPO Principles and Criteria

Principle 1: Commitment to transparency

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.

Criterion 1.2 Management documents are publicly available, except where this is prevented by commercial confidentiality or where disclosure of information would result in negative environmental or social outcomes.

Principle 2: Compliance with applicable laws and regulations

Criterion 2.1 There is compliance with all applicable local, national and ratified international laws and regulations.

Criterion 2.2 The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights

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.

Principle 3: Commitment to long-term economic and financial viability

Criterion 3.1 There is an implemented management plan that aims to achieve long-term economic and financial viability.

Principle 4: Use of appropriate best practices by growers and millers

Criterion 4.1 Operating procedures are appropriately documented and consistently implemented and monitored.

Criterion 4.2 Practices maintain soil fertility at, or where possible improve soil fertility to, a level that ensures optimal and sustained yield.

Criterion 4.3 Practices minimise and control erosion and degradation of soils.

Criterion 4.4 Practices maintain the quality and availability of surface and ground water.

Criterion 4.5 Pests, diseases, weeds and invasive introduced species are effectively managed using appropriate Integrated Pest Management (IPM) techniques.

Criterion 4.6 Agrochemicals are used in a way that does not endanger health or the environment. There is no prophylactic use, and where agrochemicals are used that are categorised as World Health Organisation Type 1A or 1B, or are listed by the Stockholm or Rotterdam Conventions, growers are actively seeking to identify alternatives, and this is documented.

Criterion 4.7 An occupational health and safety plan is documented, effectively communicated and implemented

Criterion 4.8 All staff, workers, smallholders and contractors are appropriately trained.

Principle 5: Environmental responsibility and conservation of natural resources and biodiversity

Criterion 5.1 Aspects of plantation and mill management that have environmental impacts are identified, and plans to mitigate the negative impacts and promote the positive ones are made, implemented and monitored, to demonstrate continuous improvement.

Criterion 5.2 The status of rare, threatened or endangered species and high conservation value habitats, if any, that exist in the plantation or that could be affected by plantation or mill management, shall be identified and their conservation taken into account in management plans and operations.

Criterion 5.3 Waste is reduced, recycled, re-used and disposed of in an environmentally and socially responsible manner.

Criterion 5.4 Efficiency of energy use and use of renewable energy is maximised.

Criterion 5.5 Use of fire for waste disposal and for preparing land for replanting is avoided except in specific situations, as identified in the ASEAN guidelines or other regional best practice.

Criterion 5.6 Plans to reduce pollution and emissions, including greenhouse gases, are developed, implemented and monitored.

Principle 6: Responsible consideration of employees and of individuals and communities affected by growers and mills

Criterion 6.1 Aspects of plantation and mill management that have social impacts are identified in a participatory way, and plans to mitigate the negative impacts and promote the positive ones are made, implemented and monitored, to demonstrate continuous improvement.

Criterion 6.2 There are open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties.

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.

Criterion 6.4 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.

Criterion 6.5 Pay and conditions for employees and for employees of contractors always meet at least legal or industry minimum standards and are sufficient to meet basic needs of personnel and to provide some discretionary income.

Criterion 6.6 The employer respects the right of all personnel to form and join trade unions of their choice and to bargain collectively. Where the right to freedom of association and collective bargaining are restricted under law, the employer facilitates parallel means of independent and free association and bargaining for all such personnel.

Criterion 6.7 Child labour is not used. Children are not exposed to hazardous working conditions. Work by children is acceptable on family farms, under adult supervision, and when not interfering with education programmes.

Criterion 6.8 The employer shall not engage in or support discrimination based on race, caste, national origin, religion, disability, gender, sexual orientation, union membership, political affiliation, or age.

Criterion 6.9 A policy to prevent sexual harassment and all other forms of violence against women and to protect their reproductive rights is developed and applied.

Criterion 6.10 Growers and mills deal fairly and transparently with smallholders and other local businesses.

Criterion 6.11 Growers and millers contribute to local sustainable development wherever appropriate.

Principle 7: Responsible development of new plantings

Criterion 7.1 A comprehensive and participatory independent social and environmental impact assessment is undertaken prior to establishing new plantings or operations, or expanding existing ones, and the results incorporated into planning, management and operations.

Criterion 7.2 Soil surveys and topographic information are used for site planning in the establishment of new plantings, and the results are incorporated into plans and operations.

Criterion 7.3 New plantings since November 2005 (which is the expected date of adoption of these criteria by the RSPO membership), have not replaced primary forest or any area containing one or more High Conservation Values.

Criterion 7.4 Extensive planting on steep terrain, and/or on marginal and fragile soils, is avoided.

Criterion 7.5 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.

Criterion 7.6 Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements.

Criterion 7.7 Use of fire in the preparation of new plantings is avoided other than in specific situations, as identified in the ASEAN guidelines or other regional best practice.

Principle 8: Commitment to continuous improvement in key areas of activity

Criterion 8.1 Growers and millers regularly monitor and review their activities and develop and implement action plans that allow demonstrable continuous improvement in key operations.

Annex 2:

Methods used in this study

This study was prompted by the realisation, during a brief visit to Sarawak in April 2007, that there are over 100 cases regarding disputes over customary land rights in consideration in the courts in Sarawak, of which about half are said to be related to plantations of oil palm and timber for pulp and paper. It was therefore decided that it would be important to understand more clearly the basis for these disputes, ascertain the legal and policy framework in which these conflicts were being generated and assess the situation by reference to the standards of the Roundtable on Sustainable Palm Oil.

In collaboration with the co-authors it was therefore agreed to carry out an investigation based on field interviews in a dozen or so disputed areas as well as a brief literature review to look into this situation. During June-September 2007, interviews were thus carried out in oil palm affected villages who have decided to take their concerns to the courts. Their current court status varies depending on the year the case was filed and the various stages of the trial proceedings.

The interviews were conducted mostly in the local communities, with the exception of Sungai Bawang communities in Balingian. In the latter case, the headman's son was interviewed in Sibu. Whenever possible, the plaintiffs themselves were chosen for interviews. In cases where the interviewees are not plaintiffs in court cases, the selection of interviewees was based on their position in the communities. As in the case of Sungai Bawang communities, the headman's son was interviewed since the headman is one of the plaintiffs. In Lebor Village, the two interviewees are both key members of the Village Security Committee, the community-based organisation which is sanctioned by the Malaysian government and is often the first line of defence at the village level in safeguarding the villagers' rights and interest, including security and safety. The interviews began with an introduction about RSPO to the participating community people and handouts about the RSPO were also given out. Interviews were either recorded using audio-visual equipment or through direct note-taking.

In order to standardise the information gathering process, a simple questionnaire, as follows, was devised using the relevant criteria in the RSPO standard to prompt questions about how lands for plantations were being allocated, acquired and developed.

Criterion 2.1 There is compliance with all applicable local, national and ratified international laws and regulations.

- 1.1 Do you know if the oil palm scheme in the area complies with your native laws? If Yes, Why or Why not?
- 1.2 Do you think the scheme complies with all national laws and ratified international laws? If not what are the violations and if yes, what laws?

Criterion 2.2 The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights

- 2.1 How did you first know about the scheme?
- 2.2 Did you contest against the oil palm scheme when you first knew about it? Are you contesting it now?
- 2.3 In what ways have you raised or registered objections? What has been the response?

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.

- 3.1 Does this scheme overlap areas where you have native customary rights (NCRs)?
- 3.2 What efforts did the company or government make to identify where your customary rights areas are before determining the location of the scheme? If your NCRs are recognised do you agree with the boundaries that have been recognised?
- 3.3 How has the oil palm scheme affected your communities in terms of your rights over the lands and usage of the lands?
- 3.4 Did you get full information about the scheme before it was decided on? What information was provided? Do you now think that information was accurate or adequate?

- 3.5 Did you get the option of refusing the scheme on your land? Was pressure or coercion used to impose the scheme?
- 3.6 Do you feel you had a free choice or a fair negotiation about the terms of the agreements between local people and the company?
- 3.7 Did you agree with the scheme and did you give your consent/permission to the scheme for use of your lands and why?

Criterion 6.2 There are open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties.

- 4.1 Since the oil palm scheme in the area, does the oil palm company or its agents/workers ever discuss and or consult you on the oil palm scheme?
- 4.2 How do you talk with the company? Are there any difficulties to do that? If so, what are those?
- 4.3 Is the company or its agents providing you with necessary information in an open manner?

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.

Criterion 6.4 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.

Criterion 7.6 Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements.

- 5.1 Do you know of any process made known to you or otherwise in which you can deal with any complaints and grievances?
- 5.2 How do you normally go about complaining and resolving grievances when / if they arise? Do you know how, to whom or where the complaint is to be directed or channelled?

- 5.3 What are the complaints and grievances that you have had? Do the company and or you keep a record of complaints made? What happens if your complaints are not acted on? Have you suffered intimidation when you have complained or contested schemes?
- 5.4 Has the government been supportive or how has the government try to resolve disputes?
- 5.5 Were there any discussions and mutual understanding on how complaints should be dealt?
- 5.6 Was there any discussion on compensation for use of NCR land?
- 5.7 Do you know how would your demand for compensation be negotiated?
- 5.8 If the scheme affected your customary rights, how were you represented in negotiations with the company?
- 5.9 Do you think your interests were fairly represented in any negotiations? Were you kept informed of the terms of any agreements being negotiated or agreed?
- 5.10 Do you have a documentary record of the negotiations and/ or of the contract that you have or agreed with the company?
- 5.11 If compensated, do you think you got a fair price for the use of your lands by the company?
- 5.12 Did you agree to the oil palm scheme and would you accept compensation for oil palm planted on your lands?

Criterion 7.5 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.

- 6.1 Were you consulted before the oil palm scheme started?
- 6.2 Was your consent/permission for use of lands given in free and prior informed way?
- 6.3 In establishing new schemes today, are companies now changing the way that they deal with the communities? Do the communities now have the right to say 'no' (i.e. can they refuse schemes) and are they able to negotiate fairer or more acceptable terms?

- 6.4 Did the scheme (re)plant oil palms in your NCR lands with your prior informed consent? Do you know how to deal with scheme (re)establishment?

About the authors:



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Much international concern about the social and environmental impacts of oil palm plantations has focused on Indonesia. Huge areas of indigenous peoples' lands and forests continue to be cleared and burned, contrary to the law and international human rights norms. Much less attention has been paid to similar processes taking place in eastern Malaysia, although the oil palm expansion there is no less hectic.

This report seeks to redress the balance. It is based on a review of the legal framework and an examination of the land conflicts presently before the courts, in Sarawak. It reveals that in Sarawak there are more than one hundred legal cases currently in process, where indigenous peoples have sued the government and companies for violations of their customary rights in land. Over one third of these cases concern oil palm.

The indigenous peoples interviewed about this situation are outspoken in their opposition to the way oil palm plantations are being developed on their lands. They feel their customary rights are being ignored, promised benefits not delivered and measures to secure their consent to proposed schemes overlooked. When they protest they have been criminalised for obstructing development.

Such abuses are quite contrary to the international standard developed by the oil palm industry and concerned non-governmental organisations through the Roundtable on Sustainable Palm Oil. If Sarawakian palm oil is not to be excluded from responsible international markets, major changes in laws, policies and practice are urgently required.



Sawit Watch



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