THE LAND WE LOST
Native Customary Rights (NCR) and Monoculture Plantations in Sarawak

BRIEFING DOCUMENT
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This briefing is summarised from the publication *The Land We Lost – Native Customary Rights (NCR) and Monoculture Plantations* in Sarawak released by Sahabat Alam Malaysia (SAM) in 2019. The project was focused on verifying that encroachments on native customary territories in Sarawak by large monoculture plantations have indeed been caused by systemic governance and legal issues, as opposed to isolated incidents that may have occurred as a result of the violations of legislative requirements or executive directives. In all, the publication contains two in-depth reports from two customary territories in the Miri Division, Sarawak. It also analyses the quality and effectiveness of the legal and governance framework in Sarawak in providing adequate protection for the native customary rights (NCR) and the effectiveness of certification in ensuring the sustainable production of palm oil in Sarawak and the concerns surrounding oil palm smallholders.
The natives of Sarawak

Under the law, the indigenous peoples of Sarawak and Sabah are termed as native in English or anak negeri in Malay, in contrast to the ‘Aborigine’ or Orang Asli in Peninsular Malaysia. For Sarawak, article 161A(7) of the Federal Constitution provides the list of the ethnicities recognised to be natives of Sarawak. The ethnicities mentioned are Bukitan, Bisayah, Dusun, Sea Dayak, Land Dayak, Kadayan, Kalabit, Kayan, Kenyah (including Sabup and Sipeng), Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowit), Lugat, Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun and Ukit. The Interpretation Ordinance 2005, a Sarawak state law, also provides a schedule where ethnicities recognised to be native in the state are listed. Collectively, they form a majority of the population of Sarawak, which currently stands at around 2.8 million.

Indigenous customary land rights

Indigenous customary land rights or titles are rights that have been obtained from the authority of traditional customs and customary laws, and are commonly acknowledged and enforced by members of an indigenous community. They are different from documentary land titles, which are rights obtained from documents issued by the state under legislative authority. An indigenous customary territory will include cultivation and forested areas under familial ownership as well as common areas under collective rights which comprise forests, rivers and other water bodies, burial grounds, sacred areas and other land uses.

In Sarawak, in the Iban language, cultivation and family owned land is known as temuda while the communally shared forested areas is known as the pulau galau, utilised for hunting, plant gathering, timber harvesting and water catchment protection. Together the housing site, temuda, pulau galau and other commons form the entirety of a native customary territory, known as the tanah pemakai menoa. This concept of territoriality and the division of different land uses between family and communal ownership are common amongst indigenous and traditional communities all over the world.

Protection under the Federal Constitution

The rights of the indigenous peoples in Malaysia, including their customary land rights, are protected under the various provisions of the Federal Constitution. These principles of the Federal Constitution have allowed indigenous communities to win several landmark decisions in the courts.

- Article 5: Fundamental liberties, including the right to life.
- Article 8: Equality and prohibition against ethnic discrimination.
- Article 8(5)(c): Affirmative actions for the protection, well-being and development of the Orang Asli community.
- Article 13: Right to property and the payment of adequate compensation for its loss

1. How can the law threaten or protect the NCR in Sarawak?
Article 45: Orang Asli community to be represented in the Senate.

Article 153: Special position of the natives of Sarawak and Sabah, mandating the implementation of specific affirmative actions.

Article 160: Customs and usage having the force of law must be respected as law.

How can NCR be acquired by native communities?

In Sarawak, the native customary rights (NCR) is defined and primarily addressed by the Land Code 1958, regulated by its Department of Lands and Surveys. It stipulates the manner in which the NCR can be acquired and extinguished by the state. Further, laws on forestry and conservation in Sarawak also have specific provisions to address NCR claims, including the manner in which the extinguishment of NCR must be carried out, for the gazetting of production forests and conservation areas, respectively.

Section 5(2) of the Land Code 1958 describes the methods of NCR acquisition.

(a) the felling of virgin jungle and the occupation of the land thereby created;
(b) the planting of land with fruit trees;
(c) the occupation or cultivation of land;
(d) the use of land for a burial ground or shrine;
(e) the use of land of any class for rights of way; or
(f) any other lawful method.

‘Any other lawful method’ indicates that the creation of rights on forested areas through hunting and gathering activities, in accordance with customary law, is also acceptable. When the NCR lacks any form of documentary title, such land shall continue to be viewed as state land. Native landowners shall be deemed to hold a licence from the government that is free from any land rental charges. No new rights may be acquired after January 1, 1958, unless a state permit has been obtained.

How can NCR be extinguished by the state?

The Land Code 1958, the Forests Ordinance 2015, the National Parks and Nature Reserves Ordinance 1998 and the Wild Life Protection Ordinance 1998 require for extinguishment notification to be published in the state gazette and a newspaper and displayed in the local district office. Under the forestry law, the notification may also be published in other medium as circumstances may permit, while under the two conservation laws, the notification may also be brought to the notice of affected persons in such a manner as the state thinks necessary. All these are unfavourable to rural native communities who rely largely on oral communications in their own languages. All NCR extinguishments require the payment of compensation, provided a claim is submitted on time. The determination of the amount of compensation under the different laws is based on state discretion, unlike the process for the documentary land title. Therefore it fails to abide by Article 13 of the Federal Constitution. Affected communities has 60 days to submit their claims to the authorities specified by the law being used to extinguish their NCR. While the land law grants dissatisfied claimants 21 days to submit their appeal against the compensation decision, the forestry and conservation laws provide 30 days for this process.
On which class of land can the NCR subsist?

<table>
<thead>
<tr>
<th>Land classes</th>
<th>Can NCR subsist here?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mixed Zone Land</strong></td>
<td>✗</td>
</tr>
<tr>
<td>Land that can be held under private titles and occupied by both native and non-native persons or permanent residents in Malaysia without any restrictions. It cannot be occupied by any persons without a valid document of title.</td>
<td></td>
</tr>
</tbody>
</table>

| **Native Area Land**               | ✓                     |
| Land which can be held only by native persons but under a document of title. Non-native persons are only allowed to hold rights to such land under specific circumstances, including for mineral prospecting and forest produce harvesting. | Sometimes located within native customary territories that are in close proximity to relatively urbanised areas. |

| **Native Customary Land (NCL)**   | ✓                     |
| Land in which NCR, whether communal or otherwise, have lawfully been created prior to the January 1, 1958, and still subsist as such; Native Communal Reserves; and Interior Area Land upon which NCR have been lawfully created pursuant to a permit issued under section 10. | The state tends to concede NCR only on land it deems has been under cultivation prior to 1958. This does not generally extend to forested areas. |

| **Government Reserved Land**      | ✗                     |
| Land reserved for various purposes by the state, including gazetted Native Communal Reserves, production forests and conservation areas under specific laws. | Only on Native Communal Reserves and Communal Forest Reserves. |

| **Interior Area Land**            | ✓                     |
| Land which does not fall within any of the definitions of the four other categories. The bulk of such land is located in the interior. | May still be under legitimate NCR claims, as long as no extinguishment notice in clear language has ever been effected. |
How do the different laws affect the NCR?

<table>
<thead>
<tr>
<th>Law</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Laws with the power to extinguish the NCR</strong></td>
<td></td>
</tr>
<tr>
<td>1. Land Code 1958</td>
<td>Department of Lands and Surveys, Sarawak</td>
</tr>
<tr>
<td>• Land acquisition for public purposes.</td>
<td></td>
</tr>
<tr>
<td>• Gazetting of government reserves for public purposes.</td>
<td></td>
</tr>
<tr>
<td>• Issuance of permits for land and agricultural development activities, including for oil palm plantations.</td>
<td></td>
</tr>
<tr>
<td>• Declaration of development areas to be managed by the Land Custody and Development Authority (LCDA) and Sarawak Land Development Board (SLDB).</td>
<td></td>
</tr>
<tr>
<td>2. Forests Ordinance 2015</td>
<td>Department of Forests, Sarawak; Sarawak Forestry Corporation (SFC)</td>
</tr>
<tr>
<td>• Gazetting of the Forest Reserves and Protected Forests as sub-classes of the Permanent Forest Estates (PFE).</td>
<td></td>
</tr>
<tr>
<td>• Issuance of logging licences.</td>
<td></td>
</tr>
<tr>
<td>• Issuance of pulp and paper and timber tree plantation licences. Some of these plantations may also be allowed to utilise a maximum of 20 per cent of their concession areas to grow oil palm for one cycle of 25 years.</td>
<td></td>
</tr>
<tr>
<td>3. Wild Life Protection Ordinance 1998</td>
<td>Department of Forests, Sarawak; Sarawak Forestry Corporation (SFC)</td>
</tr>
<tr>
<td>• Gazetting of Wild Life Sanctuaries.</td>
<td></td>
</tr>
<tr>
<td>• Listing of protected species and totally protected species.</td>
<td></td>
</tr>
<tr>
<td>4. National Parks and Nature Reserves Ordinance 1998</td>
<td>Department of Forests, Sarawak; Sarawak Forestry Corporation (SFC)</td>
</tr>
<tr>
<td>• Gazetting of National Parks and Nature Reserves.</td>
<td></td>
</tr>
<tr>
<td><strong>Laws on oil palm plantation development with the involvement of NCR landowners</strong></td>
<td></td>
</tr>
<tr>
<td>1. Land Custody and Development Authority Ordinance 1981</td>
<td>Land Custody and Development Authority, Sarawak (LCDA or PELITA)</td>
</tr>
<tr>
<td>• Declaration of development areas under the authority of PELITA.</td>
<td></td>
</tr>
<tr>
<td>• Implementation of various land development activities, including for oil palm plantations on land with NCR claims.</td>
<td></td>
</tr>
</tbody>
</table>
### 2. Sarawak Land Development Board Order 1972

- Declaration of land development areas under the authority of SLDB.
- Implementation of various land development activities, including for oil palm plantations on land with NCR claims.

### 3. Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976

- Implementation of oil palm plantation development on land with NCR claims and palm oil processing.

### Other laws that may affect NCR landowners

#### 1. Minerals Ordinance 2004

- Issuance of permits for mineral mining operations with the exception of petroleum, sand, limestone, sandstone and other types of stones.

#### 2. Land Surveyors Ordinance 2001

- Prohibition against any party from accepting any cadastral land surveys or survey plans, unless those that have been approved by the Department of Lands and Surveys.
- Prohibition for any person who, not being a land surveyor or a government surveyor, certifies as to the accuracy of any cadastral land survey or signs or initials any survey plan, or not being a surveying assistant acting under the immediate personal direction and supervision of a land surveyor, carried out or undertakes to carry out any work, in connection with a cadastral land survey.

#### 3. Native Customs (Declaration) Ordinance 1996 and all codified native customs under its authority

- Publication of the codification of individual living customs of different indigenous ethnic groups and the proclamation that each code shall function as the most authoritative source of customary law for the concerned community:
  - The codified customary law for each ethnic community is to be regarded as conclusive and its correctness shall not be questioned in any court.
  - No code or any of its amendments shall be held invalid solely due to the failure of the Majlis Adat Istiadat Sarawak to conduct consultations with native community leaders prior to its publication.
How can NCR be better protected by the state?

<table>
<thead>
<tr>
<th>Law</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Land Code 1958</strong></td>
<td></td>
</tr>
<tr>
<td>Section 6: Native Communal Reserves</td>
<td>Such reserves are still regarded as part of state land.</td>
</tr>
<tr>
<td>Section 10: Issuance of a special permit</td>
<td>A documentary land title to permit the occupation of Mixed Zone Land and unalienated state land.</td>
</tr>
<tr>
<td>Section 18: A grant in perpetuity free of premium rent and other charges.</td>
<td>Issued on unalienated state land for natives who have occupied and used it in accordance with customary tenure, amounting to ownership of the land for residential or agricultural purposes. Generally regarded as the best existing statutory protection.</td>
</tr>
<tr>
<td><strong>Forests Ordinance 2015</strong></td>
<td></td>
</tr>
<tr>
<td>Section 30-38: Communal Forest Reserves.</td>
<td>Resource utilisation is only for domestic use and not for sale, barter or profit. However, Section 37(3) perversely stipulates that the people shall be presumed to be taking forest produce for sale, barter or profit, unless they can prove otherwise.</td>
</tr>
</tbody>
</table>

How is the environmental impact assessment (EIA) process in Sarawak?

The EIA process in Sarawak does not require mandatory public participation

Agricultural development

- Development of agricultural estates or plantations of an area exceeding 500 hectares from land under secondary or primary forests or which would involve the resettlement of more than 100 families or which would involve modification in the use of the land.
- Conversion of mangrove swamps into agricultural estates having an area exceeding 50 hectares.

Logging

- Extraction or felling of timber from any area exceeding 500 hectares which have previously been logged or in coupes that have previously been closed.
- Extraction or felling of any timber within any area declared to be a water catchment area under the Water Ordinance 1994.
Landmark judicial decisions on indigenous customary land rights

- Indigenous customary land rights are a form of a **proprietary interest in the land itself**, protected as a right to property under Article 13 of the Federal Constitution. They may include family-owned cultivation areas as well communally shared forested areas and other commons.

- As a result of the common law recognition of their **pre-existence**, the lawfulness of such rights does not depend on any executive, legislative or judicial proclamation. In **order to determine its lawfulness, those which must be referred to are the customary laws of the community, and not any legislation**. Legislation is only relevant to determine if such rights have ever been successfully extinguished successfully at any point of time. If an indigenous customary territory is without a gazetting status or a documentary title, its existence is still lawful.

- Such rights may only be extinguished through **clear and unambiguous written notification**, in accordance with the law and with the **payment of adequate compensation as specified under Article 13 of the Federal Constitution**. Without the issuance of a clearly worded notification on the extinguishment of such rights and the payment of adequate compensation, any denial of subsisting rights can still be legally challenged.

- The payment of adequate compensation must include the payment for the **loss of heritage land**, the loss of the freedom of inhabitation and movement, the loss of forest resources, the loss of future living for oneself and other family members and the loss of future living for one’s descendants.

- Entry into an indigenous customary territory without the permission of its inhabitants and in an unlawful manner (including causing destruction to the area) is considered as **a trespass that can be subjected to legal action**.

- The government owes **fiduciary duties** to indigenous peoples i.e. a duty based on the trust between a trustee (government) and a beneficiary (indigenous peoples). These include the duty to protect the customary land rights and welfare of indigenous peoples and to not act in a manner that is inconsistent with those rights and that which may affect their well-being.

Erroneous executive legal perspectives on the NCR

Without any documentary land title, the NCR is reduced merely to a **limited form of usufructuary rights** obtained through a free land licence, without any land rental charges. Such rights are limited to the crops and built structures found on the land, and not as a form of proprietary interest in the land itself. This has allowed the state to undertake certain actions without the free, prior and informed consent of affected communities and the payment of adequate compensation. They include the issuance of licences for logging, plantation, mining and other resource extractive operations on native customary territories; the gazetting of the such territories into production forests i.e. Forest Reserves or Protected Forest or conservation areas i.e. National Parks, Nature Reserves or Wildlife Sanctuaries; and land acquisition for a host of purposes deemed to fulfil a ‘public purpose’ by the state.
2. Size of monoculture plantations in Sarawak

Department of Forests: Pulp and paper, timber tree and oil palm plantations under the Licence for Planted Forest (LPF) system

2.8 million hectares have been designated for plantation development under 43 LPF licences, regulated by the Sarawak Forests Department. The LPFs in principle are permits to develop pulp and paper or timber tree plantations. However, 15 LPFs have also been permitted to devote no more than 20 per cent of their concession areas to grow oil palm for one cycle of 25 years.

Department of Lands and Surveys: Mostly oil palm plantations under agricultural development

(a) Without the involvement of native landowners

238,885 hectares of state land have been put under the development authority of LCDA and another 46,150 hectares under the development authority of the Sarawak Plantation Berhad (SPB), the company which owns and manages the principal assets of SLDB.

(b) With the involvement of native landowners

51,072 hectares are under the development of SALCRA while another 11,017 hectares are under the development authority of FELCRA. Meanwhile, under the Konsep Baru development model another 554,523 hectares of land have been approved by LCDA for plantation development and 2,128 hectares are held by SPB under SLDB.

These show that since the 1990s, more than 3 million hectares of land, or more than a quarter of the Sarawak land area, or an area of at least approximately the size of the state of Pahang, have been designated for large monoculture plantations in Sarawak, where the size of areas designated for pulp and paper and timber trees is larger than that designated for oil palm. A significant size of these areas may fall within native customary territories and contain productive native farmlands as well as forested areas that have been mostly logged over in the previous decades, including forests that have been gazetted as production forests i.e. the Forest Reserves and Protected Forests. Therefore, we need to be clear that oil palm per se is not the only problem here. The real two principal problems are the violations of the indigenous customary land rights and deforestation. Essentially, the advent of such large monoculture plantations of pulp and paper or timber trees or oil palm in Malaysia is a post-logging development which commenced in the 1990s, after unsustainable logging practices in the previous decades had significantly depleted the country’s natural timber resources.

Certainly, not all of these areas are plantable. Some plantations in fact have yet to be fully developed. Therefore there is still time for the federal and state authorities to take the correct course of action to protect the remaining NCR territories and forested areas where land clearing activities have yet to commence.
### Size of area most likely designated for oil palm plantations in Sarawak as estimated by SAM, 2018 (hectares)

<table>
<thead>
<tr>
<th>Plantation development description</th>
<th>Size of designated areas</th>
<th>Land status</th>
<th>Number of projects</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I</strong></td>
<td>Land under the authority of the Forests Department</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Licence for Planted Forest (LPF)</td>
<td>285,520</td>
<td>Forest Reserves and Protected Forests and state land forests considered to be free from NCR claims by the state.</td>
<td>15</td>
<td>Sarawak Forests Department website (December 2018)</td>
</tr>
<tr>
<td>Planted forest development undertaken by private companies without the involvement of native communities. In principle, the LPF is a permit for the development of pulp and paper and timber tree plantations. However some licence holders are permitted to plant oil palm on no more than 20 per cent of their concession areas, for one cycle of 25 years.</td>
<td></td>
<td></td>
<td></td>
<td>Project EIA reports</td>
</tr>
<tr>
<td><strong>II</strong></td>
<td>Land under the authority of the Lands and Surveys Department</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Development authority: Land Custody and Development Authority (LCDA/PELITA)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i) Agricultural development undertaken by private companies without the involvement of native communities.</td>
<td>238,885</td>
<td>State land considered to be free from NCR claims by the state.</td>
<td>30</td>
<td>LCDA website (March 2018)</td>
</tr>
<tr>
<td>(ii) <em>Konsep baru</em>: Agricultural development undertaken by private companies on native customary land with the involvement of native communities.</td>
<td>554,523</td>
<td>State land considered to be held under NCR by the state.</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>13,952 participants</td>
<td></td>
</tr>
</tbody>
</table>

11
Joint venture with native landowners with 10 per cent equity held by LCDA, 30 per cent equity held by native landowners and 60 per cent equity held by the private investor. Capital provided by private investors while the LCDA functions as the project managing agent. Typically under a 60-year contract.

| Subtotal | 793,408 |

2. Development authority: Sarawak Land Development Board (SLDB)
   The principal assets of SLDB are owned and managed by the Sarawak Plantation Berhad Group (SPB)

   (i) Agricultural development undertaken by SPB without the involvement of native communities
       46,150 State land considered to be free from NCR claims by the state. 19 SPB website (March 2018)

   (ii) *Konsep baru*: Agricultural development undertaken by SPB on native customary land with the involvement of native communities
       2,128 State land considered to be held under NCR by the state. 1

   | Subtotal | 48,278 |

3. Development authority: Land Consolidation and Rehabilitation Authority (SALCRA)
   Agricultural development undertaken by SALCRA on native customary land with the involvement of native communities.
   Joint venture with 10 per cent equity held by the LCDA and 90 per cent equity held by native landowners. Capital provided by SALCRA while the LCDA functions as the project managing agent. Typically under a 30-year contract.
   51,072 State land considered to be held under NCR by the state. 19 SALCRA website (March 2018)
### Development authority: Federal Land Consolidation and Rehabilitation Authority (FELCRA)

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Peninsula</strong></td>
<td>2,368,395</td>
<td>2,410,019</td>
<td>2,489,814</td>
<td>2,524,672</td>
<td>2,546,760</td>
<td>2,558,103</td>
<td>2,593,733</td>
<td>2,617,334</td>
<td>2,659,361</td>
<td>2,679,502</td>
<td>2,708,413</td>
</tr>
<tr>
<td><strong>Sabah</strong></td>
<td>1,255,653</td>
<td>1,333,566</td>
<td>1,361,598</td>
<td>1,409,676</td>
<td>1,431,762</td>
<td>1,442,588</td>
<td>1,475,108</td>
<td>1,511,510</td>
<td>1,544,223</td>
<td>1,551,714</td>
<td>1,546,904</td>
</tr>
<tr>
<td><strong>Sarawak</strong></td>
<td>614,315</td>
<td>744,372</td>
<td>839,748</td>
<td>919,418</td>
<td>1,012,587</td>
<td>1,076,238</td>
<td>1,160,898</td>
<td>1,263,391</td>
<td>1,439,359</td>
<td>1,506,769</td>
<td>1,555,828</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>4,238,363</td>
<td>4,487,957</td>
<td>4,691,160</td>
<td>4,853,766</td>
<td>5,000,109</td>
<td>5,076,929</td>
<td>5,229,739</td>
<td>5,392,235</td>
<td>5,642,943</td>
<td>5,737,985</td>
<td>5,811,145</td>
</tr>
</tbody>
</table>

**Malaysian Palm Oil Board (MPOB): Size of oil palm plantations in Malaysia 2008 - 2017 (hectares)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Peninsula</th>
<th>Sabah</th>
<th>Sarawak</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
</tr>
<tr>
<td>2016</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
</tr>
<tr>
<td>2015</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
</tr>
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<td>2014</td>
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<td>5,811,145</td>
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<tr>
<td>2013</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
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<tr>
<td>2012</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
</tr>
<tr>
<td>2011</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
</tr>
<tr>
<td>2010</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
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<tr>
<td>2009</td>
<td>2,708,413</td>
<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
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<td>2008</td>
<td>2,708,413</td>
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<td>5,811,145</td>
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<td>1,546,904</td>
<td>1,555,828</td>
<td>5,811,145</td>
</tr>
</tbody>
</table>

**Notes:**
- Development undertaken by FELCRA on native customary land with the involvement of native communities.
- Joint venture with 10 per cent equity held by LCDA and 90 per cent equity held by native landowners. Capital provided by FELCRA (although management charges and marketing fees will be imposed) while the LCDA functions as the project managing agent. Typically under a 25-year contract.
- State land considered to be held under NCR by the state. Located in Sabah (federal land).
- Data as at January 2015.
Licensed areas for large monoculture plantations in Sarawak documented by SAM
3. Destructive monoculture plantations in Sarawak are different from smallholdings

Destructive monoculture plantations: Deforestation and NCR violations

It is highly simplistic, unfair and misleading to claim that opposition to the development of large oil palm plantations in Sarawak is akin to the opposition to the interests of smallholders, whose modest livelihoods we must strive to protect. In actual fact, we are critical of the expansion of all kinds of large monoculture plantations, including those where oil palm may be the crop of choice, if they involve two destructive factors:

(i) Those that require the rampant destruction of the environment, such as the new conversions of forests.

(ii) Those that are responsible for producing adverse social impacts, such as the violations of the indigenous customary land rights.

Often these two destructive factors are inextricably intertwined. Large destructive oil palm plantations are typically developed by large corporations, including those which operate transnationally, and are neither owned nor run by smallholders. This concern is also extended to all types of destructive large corporate monoculture plantations, be they cultivated with oil palm, or pulp and paper or timber trees, as long as they involve new conversions of forests and the violations of human rights. In short, we do not distinguish between the different crops of choice for such environmentally and socially destructive large corporate monoculture plantations. What we are most concerned about are the specific manner and contexts in which the monoculture plantations are developed.

Deforestation: Destructive plantations are a post-logging development

In Sarawak, most of the rights to develop large plantations of mostly oil palm or pulp and paper and timber trees were issued only in the late 1990s, encompassing large tracts of logged over forests, be they state land or those that have been reserved as production forests, i.e. Forest Reserves and Protected Forests. They are largely a post-logging development, as the overharvesting of timber between the 1970s and the 1990s had resulted in the depletion of natural timber resources. Therefore large oil palm plantations in Sarawak has a vastly different socio-economic and political context from oil palm smallholdings that had long existed in Peninsular Malaysia.

NCR violations: Destructive plantations’ adverse impacts on communities

In Sarawak, a significant size of forested and cultivated land is held under the NCR. The various weaknesses, flaws and limitations of the statutory and policy framework in respect of land and forestry governance in Sarawak have long given rise to the lack of harmonisation between the NCR claims of native communities and those conceded by the state. The state has further consistently put severe limitations to community claims of their NCR, especially...
on forested areas. It has also purportedly extinguished a significant amount of such rights during the gazetting of production forests (and conservation areas), although the legality of such policy interpretations and executive actions can still be questioned in the court of law.

Consequently, many large scale plantation permits in Sarawak, be they for the cultivation of oil palm or pulp and paper and timber trees, have in fact been issued on land where native communities lawfully claim as their customary territories, leading to numerous land conflicts. Oil palm plantation encroachments on the territories of native communities also entail the destruction of communally shared forests and productive farmlands and the pollution of rivers that rural communities depend on for their source of potable water and other domestic needs.

**Destructive plantations may even harm native smallholdings**

Unlike many oil palm smallholders in Peninsular Malaysia, native communities are not at all landless, and neither can their farmlands be described as idle or unproductive. On the contrary, destructive plantations may well turn landowning native communities into mere labourers on their own land. While native communities will almost certainly benefit from state supported smallholder schemes as well as assistance in the distribution and marketing of their agricultural and agroforestry products, the joint venture plantation scheme most advocated by the state is instead more focused on wrestling away community access to and control over their land for a maximum period of 60 years, or quite possibly, permanently, so they could be captured by private and state actors. Compounding the matter, weak governance conditions also entail that there are inadequate safeguards to ensure transparency, participatory decision making, full community consent and even meaningful profitability for the native landowners.

Many native communities are in fact highly receptive to the development of their own family-owned oil palm smallholdings, as they have been to the cultivation of other cash crops such as rubber, pepper and cocoa in the last 80 years or so. However, with their land grabbed by such plantations, how could they even profitably embark on their own independent oil palm smallholdings? At the same time, such plantations have also gravely impacted the income that affected communities had been obtaining from their farms, forests and freshwater fishery resources.

**Conclusion: Opposition to destructive plantations is not opposition to smallholders**

It therefore is inaccurate and deceptive to equate that opposition to large scale oil palm plantations in Sarawak, which destroy forests and the livelihoods and income of native communities, with the action of hurting the livelihoods and income of other smallholders in the country. Large scale monoculture plantations and smallholding farms are very different modes of agriculture. There is an urgent need to distinguish between destructive large oil palm plantations and oil palm cultivation undertaken by smallholder communities of modest means. These two types of oil palm cultivation are not the same in nature, structure and scale. They each represent vastly different economic interests, seek vastly different gradations of profitability and are situated on vastly different planes within the existing national and global political and economic hierarchy.
4. Certification of palm oil in Sarawak

How can certification overcome systemic poor governance?

In reality, the successful implementation of commodity certification is largely dependent on the robustness and efficiency of the existing governance framework. Although a certification system, on paper, can demand a standard that appears to be higher than that required by existing policies and laws, the fact remains that they are merely technical instructions that may not be able to fully overcome the limitations of structural governance conditions. Although such governance limitations may still have to be addressed by the unit being certified, this is done without the guidance and authority of legislation and regulations, which either do not exist or in many cases, operate to enforce the limitations themselves.

For Sarawak, it remains unclear how certification for palm oil will be able to effectively tackle two systemic governance issues i.e. the violations of the indigenous customary land rights and deforestation, and all of their associated issues, such as the lack of transparency, consultative practices and the free, prior and informed consent process. In fact for Sarawak, even the robustness of its EIA process is questionable, as it lacks a mandatory public participation component.

Systemic NCR violations and forest conversions in Sarawak

(i) Systemic NCR violations by destructive activities authorised by the state

Sarawak perfectly permits for oil palm and pulp and paper and timber tree plantations, logging operations as well as other land development and resource-extractive operations, to be issued by the state under the authority of the relevant legislation, without the consent and knowledge of affected indigenous communities.

Numerous pulp and paper, timber tree and oil palm plantations licensed out from the mid-1990s onwards in Sarawak have in fact encroached upon NCR territories, destroying farms and forests, polluting and drying up rivers, diminishing communities’ natural resources, including their sources of food, livelihoods and income. Divisive tactics have been employed by companies to restrain and placate affected communities, resulting in long lasting intra-community conflicts, which set to distress them further. Land disputes and internal conflicts have even occurred in joint venture projects that did not receive full community support. To put it simply, Sarawak currently does not have robust governance conditions and the institutional mechanisms to adequately address NCR issues, which can abide by the most minimum requirements of certification on matters such as consultations and consent. On the contrary, many of its institutional processes have in fact been designed to exert state control over such processes.

(ii) Forest-to-plantation conversion is part of state policy

Sarawak also perfectly permits for forests, whether gazetted production forests or state land
forests, to be converted into monoculture plantations, be they for pulp and paper and timber trees or oil palm.

Other systemic governance issues in Sarawak

The two root problems above can be further linked to at least seven issues of governance, which no matter how vigorous a certification standard is, are unlikely to be effectively addressed and resolved by it, as far as Sarawak and in many circumstances, even Malaysia, are concerned:

(i) The failure of the governance system to fully recognise the full extent of the indigenous customary land rights in accordance with customary law and landmark judicial decisions;

(ii) The absence of any law which directs a mandatory free, prior and informed consent for native communities affected by the development of monoculture plantations;

(iii) The challenge to overcome state-controlled community representation which tends to permeate consultative spaces for indigenous peoples in the country;

(iv) The lack of governance transparency on land, forests and other matters that affect indigenous peoples;

(v) The prohibition against the making of maps without state authorisation and the acceptance of any maps that are without state approval by any party, which affects the tendering of such maps as evidence in a court of law;

(vi) The lack of mandatory public participation in the EIA process in Sarawak; and

(vii) National and state forestry policies which allow for the issuance of monoculture plantation licences on gazetted production forests and state land forests, including for the purpose of oil palm cultivation.

Injustices of existing plantation licences

Our estimation shows that more than 3 million hectares of land in Sarawak, or more than a quarter of its land area, have been designated for the development of large monoculture plantations of pulp and paper, timber tree and oil palm plantations. Many existing licences today had probably received their preliminary provisional leases approval between the late 1990s and 2005. They would have affected the NCR of communities or involved forest conversions, or both. At the very least, the preliminary process for the issuance of such licences has already been mostly completed, with many projects having already gone through the finalisation stage of their licensing process while many others have in fact long begun their development activities. Therefore, despite the pledge of the new federal government to halt the expansion of oil palm cultivation areas in the country and its commitment to certification, there is simply not much land left in Sarawak for the new issuance of monoculture plantation licences that can be made to abide by a higher governance standard. How then could a certification system deal with the existing reality and its injustices?
5. Case study: Impacts on affected native communities

Native customary territories in the Miri Division involved

<table>
<thead>
<tr>
<th>Village</th>
<th>Association</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bakong, Baram</td>
<td>Residents’ Association of Sungai Buri</td>
</tr>
<tr>
<td>Batu Niah</td>
<td>Residents’ Association of Rumah Lachi</td>
</tr>
</tbody>
</table>

On free, prior and informed consent

- There is an absence of consultation and early information dissemination to affected communities prior to the issuance of the oil palm plantation licences and commencement of the operations. All representatives stated that they only became fully aware of the issuance of the oil palm plantation permits in their customary territories for the very first time, after the commencement of felling operations. Although the companies involved eventually conducted consultations with the villages, all these only took place after the licences had been obtained. Further, although the consultations might appear to be a process to obtain consent, they tend to function more as a notification process only.

- All representatives reported on the various difficulties and pressures in highlighting their protests to the encroaching companies. Their complaints were often responded to with the argument that the licences had already been legally obtained.

The community of Sungai Sebatuk had had to resort to harvesting the oil palm fruits cultivated on their land as a protest action, which caused several individuals to be detained while others were investigated by the police. They also alleged that they suffered the intimidation of unknown persons who brought up the murder of a land rights activist and lawyer in their informal discussion. This caused the people to feel highly threatened.

- There is an absence of a process that mandatorily compels the direct dissemination of notification letters as well as official documents and information pertaining to the issuance of the oil palm plantation licences to affected indigenous communities. Both communities eventually managed to obtain a limited amount of information through their own initiatives.

On information and remedial actions

- Information on the boundaries of non-gazetted indigenous customary territories as interpreted by the state is not communicated to the communities, whether through maps or ground demarcation.
Protest letters from the communities frequently did not receive any response from government agencies.

The police have generally failed to take effective action in investigating the complaints of the communities on the oil palm encroachments.

On the whole, both communities are not satisfied with the services provided by government agencies.

**On the psychological distress suffered by the affected communities**

- **Oil palm plantations have caused deep internal crisis and fractions within affected communities.** Both communities continue to suffer from deep internal conflicts as a result of the arrival of the oil palm plantations. Representatives spoke of their psychological distress and deep hurt that their communities are today deeply divided to the extent that some residents are no longer speaking to each other.

- **The communities alleged that they had been subjected to questionable tactics for the purpose of obtaining their ‘consent’, including the persuasion for affected families to sell their land.** Both communities reported that their communities did receive modest amounts of gifts and assistance from the oil palm plantation companies, in particular during festive seasons. However, members of the Sungai Buri community also claimed that they were continually persuaded to sell their land at a rate of RM500 per hectare. This is a legally questionable action since native customary land cannot be sold to non-native persons. Many anxious landowners reportedly caved in under pressure, for fear of not receiving anything at all for eventual loss of their farms and crops.

**On adverse environmental and socio-economic impacts**

All the respondents verified that both oil palm projects have deforested large parts of their communal forest, destroyed numerous family farms and polluted the rivers, affecting their sources of food and income derived from agricultural, forest and fishery resources and materials used in construction, craft and tool making, traditional healing practices and cultural and spiritual ceremonies.

The destruction of the farms in the two communities is a source of great suffering for them, which recorded a staggering variety of cash and rare crops. The losses included cash crops like rubber, cocoa, pepper and banana, multipurpose plants like rattan and bamboo, a variety of plants with edible piths consumed as vegetables, or *umbut*, as well as common and rare fruit trees including durian, rambutan, jackfruit, stinky beans, areca nut, *compedak*, *langsat*, *rambai*, *isu*, *embawang*, *engkabang*, *engkala*, *dabai*, *puak*, *cekak*, *pakan*, *lembak*, *cuit*, *tekalong*, *tuba* and *tarap*.

All respondents described how easy it was to hunt or trap wild animals, fish and harvest other forest resources in the past. Among the wild animals that could be found easily included various species of wild boar, deer, foxes, monkeys, porcupines and birds. In Sungai Buri today, only monkeys can still be found easily. The forest also provided a significant amount of wild vegetables from leafy greens such as *sabung* and *kesindu*, ferns
like *midin*, mushrooms to *umbut*. The sharp decline of the *umbut* which also used to provide an easy and popular income source is greatly felt. Amongst the most popular wild *umbut* are *rebung*, *pantu*, *nibung*, *gereneh*, *rua*, *lalis*, *kubal*, *keranji*, *kemajau*, *juit* and *asam paya*. Wild fruit trees were also harvested during their fruiting season, but the destruction of the forest also means many of such trees have been lost permanently. Generally, such plants are only readily available for individual families if the species happens to still grow on their family farms that have not been destroyed. There is also now scarcity of timber trees, traditionally utilised for housing, farming hut and boat construction. As a result, the people today have no other choice but to purchase wood for construction or renovation works.

Most of the rivers in the two territories have been polluted by chemicals used by the plantations, as well as by siltation, causing the sharp depletion in river resources. The rivers in both territories used to have an abundance of various species of fish and prawns, which used to be a stable source of income for many of the respondents, especially in Sungai Buri. Fishing has to be done in areas located further away, increasing the costs of petrol for their boats, but bringing home only smaller amounts of catch. The villagers in Sungai Buri recounted a variety of fish species which used to be in abundance, such as *biawan*, *baung*, *puya*, *toman*, *tapih*, *padi*, *kaloi*, *kenadak*, *palau*, *lipai*, *jeruai*, *udun*, *haruan* and *keli*. Today, they stated that only the cheaper *biawan* can be found more easily.

In Sungai Buri, the main potable water supply is from a gravity-fed system, sourced from a smaller stream in a nearby hill. However, during the land clearing operations, the water turned muddy for three months. During this period, many community members suffered from stomachaches after drinking the polluted water. Even today, the water would still turn muddy with an unpleasant odour during the rainy season, although it would be clear within a shorter period of time. When the water supply is muddy, the alternative would be the rainwater collected in individual family water tanks, which have been provided with a filter by the government.

In Sungai Sebatuk, for cleaning, many of the families are now also relying on rainwater collected in their family tanks, although bathing is still commonly done in a stream nearby. Potable water would either be sourced from public taps in the township of Batu Niah or from bottled water that has to be purchased in large quantities. This community also owns a communal filtered water tank, but as a result of internal conflicts, the respondents stated that they no longer felt comfortable accessing water from the village tank. The respondents also reported the death of fish and prawns when the oil palm mill nearby releases its effluents.

In the past, most families in Sungai Buri derived their main income from the sale of produce at the Miri weekend market, although it is also common to sell within the community itself on a daily basis. Today, some families may have to wait for two weeks before being able to obtain a decent volume of fish and other produce. All would have to spend longer hours to fish or to collect forest produce. Further, most families are also forced to develop alternative income sources such as through the cultivation of commercial vegetables, the development of oil palm smallholdings, working on other families’ smallholdings, providing vehicle charter and driving services and opening up small businesses. A few younger adults have also sought permanent employment in the town. In Sungai Sebatuk, a number of villagers had attempted to harvest and sell the oil palm fruits on their farms, as an act of protest. A few residents had been arrested, although not charged, as a result of this.
Specific impacts on women

In the past, fishing was a reliable source of income for many women, apart from forest resources like umbut. Women were able to fish nearby their farms, sometimes alone. Today, many have reduced or abstained altogether from fishing. Unless during the rainy season, fishing almost has to be conducted in areas located further away and for longer hours, in order to ensure a modest amount of catch, which in any case tends to be lower than that which they could bring home in the past.

In Sungai Buri, the women also expressed their fear on the recent increase in crocodile sightings as the animal’s food sources have also been affected by forest destruction and river pollution. A few women also expressed their discomfort that the project has brought male outsiders to work on their land. Many women in Sungai Buri today have had to turn to vegetable farming to generate their income independently from their husbands, which brings in a much smaller amount of income for them. At the same time, they are also no longer able to engage in the making and sale of handcraft. Today, a few have started to utilise plastics to replace the natural materials. In Sungai Sebatuk, vegetable farming by women are now mostly done only for domestic consumption, although a few women are still able to derive some income from it.

In all, the female respondents expressed their frustration of having to be more financially dependent on their husbands today, or for single mothers, the compassion of other family and community members. They also greatly missed the sense of safety in their freedom of movement in the past.
Why do NCR violations continue to occur in Sarawak?

1. The absence of land tenure security and the unilateral interpretation of customary territory areas by the state

The root cause of the NCR violations is the absence of land tenure security. This is caused by the weaknesses of the various statutes regulating land, forestry and conservation areas and a host of erroneous interpretations by the state regarding the features of the NCR, which are in conflict with customary laws and judicial decisions. The determination of the size of NCR territories has been conducted unilaterally, without any issuance of official maps or boundary demarcation on the ground. As such, the people are not even certain how the state arrived at their interpretation of the size and boundaries of their customary territories. Further, the states also tends not to actively utilise any existing statutory provisions which can be used to improve NCR tenure security.

2. Limiting NCR claims only to active cultivation areas and the refusal to recognise NCR on forested areas

The Sarawak state government has openly stated its policy of limiting its recognition of the NCR to active cultivation areas, consistently disputing the existence of communal rights to forested areas. As most indigenous family farms are located nearby navigable rivers for their easy accessibility, according to many maps produced by the state government, areas identified as NCL by the state tend to be largely limited along riverbanks.

3. The use of colonial aerial photographs to determine cultivation areas under NCR

In order to distinguish forests from cultivated areas in their unilateral mapping of NCR areas, where rights tend to be conceded only on the latter but largely curtailed on the former, the Sarawak state government relies primarily on aerial photographs taken during the colonial period. However, native communities tend to conduct total land clearing only for the cultivation of rice and cash crops. Some family farms or orchards may well still be left largely forested, if the land already contains abundant valuable and long-living wood, fruit, medicinal and other multi-purpose trees like rattan and bamboo. Such photographs are also unable to show the subtle differences between virgin forests and partially disturbed forests that have regenerated extensively, during its fallowing period or long after the relocation of farms or housing sites. The photographs alone are clearly insufficient to determine the extent of the territories without corroboration from joint ground surveys, adjacent villages and historical, administrative and anthropological records. Finally, the aerial photographs themselves are not made accessible to the villages and the public.

4. The unilateral interpretation of native customary rights as a mere usufructuary right

To date, the state continues to interpret the NCR as a limited form of usufructuary rights or as a rent-free land licence, instead of a citizen’s proprietary interest in the land itself. Such rights may encompass the ownership rights to crops, housing and other built structures, but not the
rights to the land itself. Such an interpretation again is in contradiction to customary laws and judicial decisions.

5. Failure to fully understand the principles and essence of the NCR

Although the Land Code 1958 in Sarawak does stipulate the manner in which the NCR may have been acquired by a native community and provide for the characteristics and features of the NCR and the legal definition of the NCL, they do not fully capture the principles and essence of the rights as developed and practised by the communities in their entirety. For example, the law does not employ native terms and concepts in elaborating such rights. The most important of these is the concept of territoriality in the exercise of the NCR and the two key land use patterns within such a territory. These terms include those such as the *tanah pemakai menoa*, which refers to the entire indigenous territorial domain, which contains the *temuda* or family-owned land made up of farms, orchards and at times, smaller plots of forested areas, and the *pulau galau*, the communally-owned forest reserve, the village commons where hunting and plant harvesting and gathering activities take place, which also doubles as the village water catchment area.

6. Participatory mapping and boundary demarcation process for the purpose of the communal reservation of their land is not actively undertaken

The state has also failed to take the appropriate action to map and demarcate the boundaries of native customary territories in their entirety with the participation of the communities and their free, prior and informed consent. Native communities in Sarawak have also not been given further information on the extent and size of their customary territories, whether through boundary demarcation or any cartographic documents. Statistical information on NCR areas that have been reserved for community use or issued with some form of documentary title or permit is also not in the public domain. Although native communities are fully aware of the boundaries of their customary territories and land use management within their villages, all community representatives interviewed affirmed that they did not have any knowledge of how the state interprets the boundaries of their customary territories.

The state clearly does possess some data on the size of land classed as native customary land. However it is the policy of the state to deny that the NCR may also extend to the forested areas, in contradiction to the customs of the various native communities. Therefore, any official statistical or cartographic data on the size of native customary territories that are without any reservation status or some form of documentary land title is highly unlikely to be accurate as it would have excluded large tracts of forested areas, especially those that have been gazetted as either production or conservation forests, where such rights have been deemed largely extinguished, with or without the prior knowledge of affected communities.

7. NCR recognition that is in conflict with community interest and neglects the concept of territoriality

The state has also failed to take into account the concept of the territoriality of customary land when and where any land title issuance or land gazetting effort is undertaken. Executive recognition of such land tends to bring with it the risk of causing the original size of such traditional territories to shrink.

8. The reservation of Forest Reserves and Protected Forests and conservation areas and land acquisition process without the free, prior and informed consent of affected native communities and with poor notification process
There is no statutory provision anywhere in any of the existing laws in Sarawak which requires a mandatory free, prior and informed consent process to be obtained from affected communities for any processes which may result in the extinguishment or heavy regulation of the NCR. All NCR extinguishment process undertaken through these different laws only requires for its notification to be published in the Sarawak state gazette and in one newspaper and displayed at the local district office. For land acquisition process requiring a forced relocation, the state does typically inform affected persons in a more personal fashion. For the reservation of the production forests and conservation areas, the state may also inform affected persons in a personal fashion, but this is a discretionary act. As a result, historically, many affected communities were not even informed of their NCR extinguishment for these two purposes, in particular for the establishment of production forests.

9. No guarantee of adequate compensation process for the loss of the NCR

Provisions on compensation for the loss of the NCR be they in the land, forestry or conservation laws do not guarantee adequate payment as demanded by Article 13 of the Federal Constitution. Compensation on the loss of such land rights is entirely based on the discretion of the state government.

10. The issuance of resource-extractive and land development permits without the free, prior and informed consent of affected native communities

Licences for logging and pulp and paper and timber tree plantation licences (the latter requiring the clear-felling of forests) are issued by the Sarawak Forests Department both over the gazetted Permanent Forest Estate, largely made up of two sub-classes of forests, namely, the Forest Reserves and the Protected Forests, as well the non-reserved state land forests. Some tree plantation licences however, mostly growing pulp and paper trees, are allowed to devote 20 per cent of their concession areas to grow oil palm for one cycle of 25 years. Further, land development permits for oil palm plantations are also issued by the Department of Lands and Surveys on land beyond the jurisdiction of the Forests Department, including on forested and cultivation areas where the NCR are claimed.

11. The lack of governance transparency and information access

All of the above issues are in fact closely linked to the absence of transparency in the dissemination of important information to native communities. This information includes the boundaries of native customary territories as interpreted by the state, the gazetting of the Permanent Forest Estate and conservation areas, as well as the issuance of plantation and logging licences.

There is not one statutory provision in Sarawak that requires the mandatory dissemination of information to native communities in respect of matters that may have an impact on their NCR. As a result, conflicts over native customary territorial boundaries are the norm rather than the exception, wherein the assertions of affected communities are simply ignored and remain unrecognised by state authorities. Compounding the matter is the fact that the villages are not informed about the territorial boundaries that have been interpreted by the state through official maps and boundary demarcation on the ground.

It is almost certain that the government’s interpretation of native customary territories is much lower than the original extent inherited by the communities since time immemorial. However, at the very least, the dissemination of information can be used to develop a
dialogue to resolve any disputes that may arise between the state government and villages. Unfortunately, this is not the common practice of the Sarawak state government.

High-quality maps that are visually friendly and are able to illustrate the boundaries of the Permanent Forest Estate, native customary territories and licensed areas for logging and pulp and paper and timber tree and oil palm plantations are currently neither available on the websites of government agencies nor distributed amongst affected native communities. The same is true for other important information. Only on project sites are signboards erected to provide some details on such operations.

Information access on forestry matters can be extremely limited in Malaysia, with Sarawak being one of the most difficult states in this aspect. In Sarawak, our attempts to obtain detailed maps and information on all logging concessions have always failed, despite having written official requests for the purpose. Similarly, information on the licences for oil palm and pulp and paper and timber tree plantations is not readily available in the public domain. As a matter of fact, we have not even been able to receive any favourable response in our request for detailed maps and descriptions of the state’s gazetted production forests over the years.
The following recommendations ultimately aim to provide land tenure security for native communities and increased transparency in land and forestry governance in Sarawak.

1. Protection for the remaining indigenous customary territories and forested areas

There is still time for the federal and state authorities to take the correct course of action to protect the remaining NCR territories and forested areas where land clearing activities have yet to commence. There is an urgent need to review or revoke large monoculture licences which affect indigenous customary territories as well as forested areas, whether they are gazetted production forests or non-reserved stateland forests, regardless of the kind of commodity involved. This call in fact extends to the entire country, as both Peninsular Malaysia and Sabah are also engaged in the development of large monoculture plantations that affect indigenous customary territories and forested areas.

2. Legal reforms for the purpose of aligning statutes with landmark judicial decisions on native customary territories

Taking into account the landmark judicial decisions on indigenous customary land rights and the failure of the federal and state governments to introduce the appropriate amendments to the relevant statutes, there is now a lack of consistency between the two bodies of law.

As such, amendments to the relevant laws must be undertaken for the Land Code 1958, the Forests Ordinance 2015, the National Parks and Nature Reserves Ordinance 1998 and the Wild Life Protection Ordinance 1998 as well as other statutes that may have an impact on the native customary rights.

In view of these landmark judicial decisions, it is therefore legally inappropriate for the state authorities in Sarawak to continue the following practices:

(i) The unilateral determination of the size and territorial boundaries of native customary rights without the free, prior and informed consent of communities and through heavy reliance on aerial photographs.

(ii) The action of extinguishing or reducing native customary rights without an agreement that has been obtained through a free, prior and informed consent process and the payment of adequate compensation. This principle applies to both the land acquisition process and the gazetting of indigenous customary territories into the Permanent Forest Estate or other conservation areas.

(iii) The issuance of logging, plantation, mining or other resource-extractive licences, including for oil palm plantations, in the Permanent Forest Estate, with the presumption that any subsisting native customary rights have been successfully extinguished under the law, without actually taking the action to do so in clearly written language, if such forests still form part of a native customary territory through their continuous occupation.
(iv) The issuance of logging, plantation, mining or any resource-extractive licences on native customary territories, including for oil palm plantations, without an agreement that has been obtained through a free, prior and informed consent process, or at the very least to ensure that the extinguishment of the native customary rights and the payment of adequate compensation for the loss of such rights have been first conducted.

(v) The refusal to give stronger recognition to native territories either through the land or forestry law based on the size originally claimed by the communities.

3. The introduction of a definition of native customary rights in accordance with community perspective in the legal system

The Land Code 1958 must be amended to introduce a detailed definition of the features of native customary rights that are in accordance with community perspective on their customary territorial rights, the Federal Constitution and landmark judicial decisions on indigenous customary land rights.

4. The introduction of a participatory mapping and boundary demarcation process for native customary territories for the purpose of the gazetting and issuance of a communal grant for the land

Based on an accurate interpretation of the concept of territoriality in the exercise of indigenous customary land rights and supported by the Federal Constitution and landmark judicial decisions, a participatory mapping and boundary demarcation process must be introduced by the state for the purpose of the gazetting and issuance of a communal grant for native customary territories in Sarawak.

For this purpose, the legal provisions most favoured by native communities are those that provide for the issuance of a grant of perpetuity, free of any rental charges under section 18 of the Land Code 1958 and those which provide for the establishment of the Communal Forest Reserves under the Forests Ordinance 2015.

5. The issuance of land recognition that is consistent with community interest and in accordance with the native concept of territoriality

The communal gazetting of native customary territories must be undertaken with the consent of the concerned communities and should not cause the size of such territories to decrease. Further, it must also take into account the diverse strategies of different tribes in managing the land use patterns of their customary territories.

6. The extinguishment of the NCR, the change in land status and the gazetting of the Permanent Forest Estate and conservation areas can only be undertaken with the free, prior and informed consent of affected communities and the payment of adequate compensation

The land, forestry and conservation laws must be amended to ensure that all processes which may cause NCR extinguishment cannot proceed without the free, prior and informed consent from and adequate compensation payment to affected communities. Further, other amendments must also take place, including, introducing provisions on an effective personalised notification process, which takes into account the language of the notice, the manner in which the notice is displayed and communicated orally to affected communities.
and a longer duration for affected communities to put forward objections and claims for adequate compensation.

7. The halting of the issuance of the licences for oil palm and pulp and paper and timber tree plantations and other land development and resource extractive operations on native customary territories without the free, prior and informed consent of affected communities

A host of the relevant laws must be amended to ensure that the process for the issuance of logging, plantation, mining and other land development and resource extractive operations can only be carried out after the free, prior and informed consent of affected native communities has been obtained. This means that any consultation with the affected communities must be undertaken prior to and not after such licences have been issued.

In order to permit such a process, the state administrative system must possess clarity on the location and territorial boundaries of native customary land rights, in accordance with each community’s interpretation. Any unilateral interpretation by the state on the locations and boundaries of their territories will only cause an increase in land rights disputes in the future.

8. Ensuring transparency in the governance and legal structures relating to land, forestry, conservation areas and natural resource extraction activities

Transparency in the governance and legal structures relating to land, forestry, conservation areas and natural resource extraction activities must be improved through the introduction of the necessary amendments to all the relevant statutes. These laws include but are not limited to, the Land Code 1958, the Forests Ordinance 2015, the National Parks and Nature Reserves Ordinance 1998 and the Wild Life Protection Ordinance 1998.

Apart from this, the public administration system must also be empowered with official directives to ensure that information on land, forestry, conservation areas and strategies and the extraction of natural resources which may have an impact on native communities and the public at large is publicised through the websites of the relevant government departments and agencies and their direct dissemination on the ground for affected communities.

In addition, information on the boundaries of the Permanent Forest Estate and other conservation areas must also be in the public domain. High-quality and visually friendly maps of such areas for the general public must be published on the websites of the relevant government departments or agencies, while clear boundary demarcation must also be carried out in the field.

Equally important, the state government must also provide the public with easy and free access to information on logging, oil palm and pulp and paper and timber tree plantation, mining and other resource extractive licences on an annual basis. Such information must include at the very least maps of the licensed areas, duration for operations, licence numbers and the names of the licence holders and their contractors.

There has been much confusion on the ground for native communities as a result of the lack of such information, especially prior to the commencement of any licensed operations. This has complicated their efforts to articulate their opposition or even to make further inquiries on such licences. All such issues can be easily resolved if there is clear executive policy that compels such information to be placed freely in the public domain.
The land we lost – the oil palm plantation on the shared native customary territory of four Iban single-origin longhouses in Sungai Buri.

The *rarung* or burial ground of warriors and important persons of the Sungai Buri Iban customary territory, evidence of their long occupation of the territory.
A villager seeking shelter from the sun on the barren and heavily eroded land.

The river that has been made shallow by the siltation caused by the oil palm plantation in Sungai Buri.
Case study: Rumah Lachi Residents’ Association

The land we lost – the oil palm plantation on the native customary territory of the Iban longhouse in Sungai Sebatuk.

Two villagers from Sungai Sebatuk showing the remaining structure of their old longhouse, known as the *tembawai* in Iban, in the midst of the oil palm plantation, evidence of their long occupation of the territory.
A villager pointing out to the site where a heated argument once ensued with the company representatives.

The road that was allegedly dug out to prevent the people from harvesting the oil palm fruits, an action they undertook as a demonstration of their protest against the plantation.
Cover photograph: An Iban villager of Sungai Buri, Bakong, Miri, Sarawak looking over the oil palm plantation that has encroached upon his community’s customary territory.