

Report Part Title: Malaysian Borneo:

Report Title: Community-investor business models:

Report Subtitle: Lessons from the oil palm sector in East Malaysia

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International Institute for Environment and Development (2011)

Stable URL: <http://www.jstor.com/stable/resrep16524.8>

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2. Malaysian Borneo: land, people and development

2.1 Ethnic diversity and customary lands

Sabah and Sarawak are both influenced by their unique colonial past, diverse ethnic groups, their respective physical and political landscapes, and policies and enactments that differ from those of Peninsula Malaysia. All these factors have a bearing on the current focus on agriculture as a vehicle for development. The majority of those affected by oil palm expansion in Sabah and Sarawak are indigenous peoples. Most affected among them are those whose economies are land based, especially the Kadazan Dusun, Murut and Orang Sungai groups of Sabah and the Iban, Bidayuh, the Orang Ulu groups and Melanau in Sarawak. There are numerous smaller ethnic groups categorised in official records as 'Other indigenous'. Sabah has more than 30 ethnic and sub-ethnic indigenous groups, making up close to 60% of the state's population; in Sarawak there are 38 sub-ethnic groups that make up around 50% of the state's population. In both states, these communities form the majority of the rural population.

Most indigenous communities in Sabah and Sarawak are closely associated with their ancestral territories (Appell, 1989, 1997; Ngidang, 2003; Sather, 1990). Generally, rights or ownership to land are conferred to the pioneers that first cleared land for cultivation. There are customary laws which include the right to cultivate land, rights to the produce of the jungle, hunting and fishing rights, rights to use the land for burial and ceremonial purposes, and rights of inheritance and transfer. Ngidang (2005) emphasises that among Iban groups *adat* (or customary laws) stipulates rights of ownership, not merely use rights.

Within this territory they have often developed sophisticated resource management systems which are adapted to the vagaries of the different landscapes.³ Typically, such systems involve rice cultivation (largely hill rice) and a mix of other subsistence crops. In Sarawak, for native longhouse communities, swidden or shifting cultivation requires a reserve of land and forests aside from cultivated land to ensure a sufficient rotational fallow system. Customary law, or *adat*, helps govern individual and group access to land and resources. It is these traditional land use systems that form the basis of what is now commonly referred to as native customary land. *Adat* defines the native person's socio-cultural environment where a longhouse territory is located and separates it from its neighbouring longhouse communities. It also dictates social practices, which are closely associated with farming activities, resource use and livelihood strategies.

3. Doolittle, 2001; Colchester *et al.*, 2007; Cramb, 2007; Majid Cooke and Vaz, 2011.

The cultivated landscape consists of ancestral lands that have been planted with food crops and hill rice, and forested fallow land or *temuda*, interspersed with fruit trees. Native communities have also demonstrated an interest in cash crops; rubber, pepper,⁴ cocoa and coffee have historically become incorporated into individual smallholdings. The investment in commercial crops by longhouse communities in Sarawak happened largely unseen and unassisted in the period before and after the Second World War and demonstrates the versatility of native communities in responding to economically attractive land use options (Cramb, 2009; Ichikawa, 2007).

There are also uncultivated cultural landscapes, comprising 'islands' of primary forest called *pulau galau*, reserved for hunting and gathering and for timber for building materials, and sacred sites. The Iban regard their territorial domain or *pemakai menoa* to include areas of *temuda* and *pulau galau* (Ngidang, 2003; Ichikawa, 2007; Cramb, 2009).

Legally, however, the Sarawak Land Code (SLC) 1958 limits the recognition of native customary lands or 'native customary rights' (NCR) to a strict legal definition, where 'land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January 1958 and still subsist as such'. NCR in this statutory sense is 'created' when land is planted with at least 50 fruit trees per hectare, or land has been continuously occupied or built upon for three years; there are several other conditions. However, these claims are only applicable if the NCR land was created prior to 1 January 1958. No new NCR can be created after this cut-off date except with a permit from the Superintendent of the Lands and Surveys under section 10 of the SLC.

Further, the Sarawak state's definition of NCR claim is only restricted to the cultivated areas or *temuda* – which must have been cultivated or farmed before 1958. Most natives perceive their customary lands to encompass more than their *temuda* to include the *pemakai menua* and *pulau galau*. Similar kinds of legal restrictions are found in the Sabah Land Ordinance (SLO) 1930.

The third perspective to native customary rights is one based on common law. This refers to case law developed by judges through the decisions of courts of the Commonwealth rather than through legislative statutes. This gives significant weight to precedential cases, which future decisions must follow. In Malaysia as a whole, the precedent includes landmark decisions that have reaffirmed the recognition of native rights that arise out of native laws and customs (Bulan and Locklear, 2008). A key landmark case, *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769* has set a precedent by recognising *temuda*, *pemakai menua* and *pulau galau* as forms of native customary rights over land, and not just in the strict sense of the Sarawak Land Code 1958. These differing interpretations of what

4. Pepper remains an important smallholder crop in Sarawak; it is estimated to support the livelihood of 67,000 rural dwellers. According to the Sarawak Agricultural Department, in 2009 the state exported 22,000 tonnes (valued at MYR 156 million or USD 52 million), making Malaysia the fifth largest pepper exporter in the world.

constitutes native customary rights in Sabah and Sarawak is a powerful point of contention between native communities and the state land offices and the state laws continue to be challenged in court.

Consequently in this report we refer to NCR lands as lands claimed under customary rights that are visible to the state as acknowledged by statutes (especially via Title), as well as lands managed by indigenous communities using a complexity of rules under *adat* law that may be invisible to the State but which govern access and ownership to land in the reality of community lives. By extension, indigenous peoples whose lands are titled and/or not titled but recognised as having legitimate access or ownership according to *adat* are referred to as customary landowners (not NCR landowners as is the common practice in both Sabah and Sarawak).

2.2 Harvesting the benefits of the 'golden crop'

Oil palm (*Elaeis guineensis*) is hailed as the highest yielding oil crop per hectare (Basiron, 2007; Teoh, 2010); it is reportedly ten times more productive than soybean and a perennial tree crop with a productive life of 25 to 30 years. In Malaysia, since oil palm began to be widely planted in the 1960s, the crop has become the mainstay of the national economy and a major engine of growth, earning its reputation as the 'golden crop'. Palm oil is currently Malaysia's third largest export and a significant foreign income earner. Global exports in 2010 totalled MYR 59.8 billion (USD 19.6 billion).⁵ These achievements have also cemented Malaysia's reputation as a world agribusiness leader, and many other developing countries now seek to emulate the 'Malaysian Miracle' (Stiglitz, 2007) by developing oil palm plantations.

Historically, oil palm expansion has also been credited with bringing development to impoverished rural communities, particularly in Peninsular Malaysia. In the 1970s, the crop was considered central to the opening up of new lands for the resettlement of the rural landless through the Federal Land Development Authority (FELDA). The incidence of poverty among participants in the FELDA schemes reportedly fell from 30.3% in 1970 to almost negligible levels in the 1990s (Simeh and Ahmad, 2001).⁶

Since the 1990s, the East Malaysian states of Sabah and Sarawak have become the focus of plantation expansion. Sarawak is the largest state in Malaysia, while Sabah is a close second. Together they have a total land area of just over 198,069km². According to the 2010 census, Sarawak's population was 2.5 million while Sabah's population was 3.2 million. These states have the lowest population densities in Malaysia: 19 inhabitants/km² for Sarawak, and 42 inhabitants/km² for Sabah.⁷ More than half of their population is rural. They also reportedly have the highest incidence of poverty among the 13 states at 19.7% in Sabah and 5.3% in Sarawak, compared to 3.8% for

5. At the time of writing, the exchange rate was approximately MYR 3.0 to USD 1.0.

6. However, FELDA has not been free of controversy. Groups of FELDA scheme participants have filed lawsuits against FELDA for under-grading and underpayment of FFB. Reported in Malaysiakini <http://www.malaysiakini.com/news/167187> (accessed on 17 June 2011).

7. 2010 Malaysian Population and Housing Census.

Malaysia as a whole.⁸ Poverty alleviation therefore continues to feature prominently in the rationale for continued oil palm expansion (Majid Cooke *et al.*, 2006).

Presently, Sabah has the largest area under oil palm in the country at 1.4 million hectares. Sarawak is viewed as the next frontier for expansion – in 2010, the total area under oil palm in Sarawak grew by 9.5%, compared to just 3.5% in Sabah and 1.4% in the Peninsula. Oil palm features prominently in the development agenda for the two states – the Sarawak government has stated its aim to boost its current area of 0.9 million hectares to 2 million hectares of oil palm by 2020 (Malaysian Palm Oil Board, 2011), while Sabah is positioning itself as a centre of excellence and trade for agricultural products by 2025 as contained within the Sabah Development Corridor Blueprint (IDS, 2007). Sabah has set a target to multiply the contribution of agriculture to the Gross Domestic Product (GDP) by four times to MYR 17 billion (USD 5.7 billion) and palm oil has been singled out as the main driver of this growth.

Table 1. Area under oil palm, Sabah and Sarawak, 1990-2010

Region	1990 (ha)	1995 (ha)	2000 (ha)	2005 (ha)	2009 (ha)	2010 (ha)	Increase in area
Sabah	276,171	518,133	1,000,777	1,209,368	1,361,598	1,409,676	410%
Sarawak	54,795	118,783	330,387	543,398	839,478	919,148	1577%
Total Malaysia	2,029,464	2,540,087	3,376,664	4,051,374	4,691,160	4,850,000	139%

Source: Malaysia Palm Oil Board (2009) Annual Report available at http://econ.mpob.gov.my/economy/annual/stat2009/Area1_2.pdf (accessed on 25 August 2011) and Choo (2011).

2.3 Customary land as the next resource frontier

Under Malaysia's federal system, land is a state matter. Each of its 13 states is governed by its own state government. Land development projects (logging, oil palm and other cash crops such as rubber) form the basis of state wealth, which is generally cultivated through strategic alliances of political and economic interests that have endured through the post-independence period. For state governments, land development projects have historically been the main source of public revenue, as royalties from natural gas go to the federal government (Majid Cooke, 2006).

From the 1960s in Sabah and the 1970s in Sarawak, logging provided both states with the bulk of their revenue and a support base for political parties in power through licences and contracts. By the 1990s, Sabah and Sarawak became among

8. As of December 2009 and listed in the 10th Malaysia Plan 2010. The measures used for calculating poverty are disputed as they often result in the underestimating of the scale of the prevalence of poverty in Sabah and Sarawak.

the world's largest exporters of tropical timber. Today, large-scale development of oil palm and associated industries has replaced logging as the dominant development driver in both Sabah and Sarawak. Both are the only states in Malaysia to derive revenue directly from the oil palm industry: a 7.5% sales tax is imposed on crude palm oil (CPO) in Sabah and in Sarawak it ranges from 2.5% to 5% depending on the market price of CPO.⁹ Several federal and state government agencies and statutory bodies have been at the forefront of oil palm development, and have introduced various partnership models devised to develop oil palm on native customary lands.

While there are a number of different models in use, all have the stated objectives of improving the economic status of native participants and developing profitable businesses on lands considered to be 'idle'. This is seen in the mission statement of the Sarawak Ministry of Land Development which is 'to expedite the development of Native Customary Rights (NCR) land and other idle land into economically productive assets for optimal and sustained benefits to landowners and the State through plantation development and commercial oriented programmes.'¹⁰ This follows the State's statutory definition of NCR but it is clear that the aforementioned 'idle lands' could very well mean those areas claimed by natives as customary land that lies beyond cultivated areas or *temuda*. These areas have not been officially recognised as NCR land despite the existence of the body of common law that supports this recognition.

Presently, as a result of almost two decades of oil palm expansion beginning in the 1990s (see Table 1), most State Land in Sabah and Sarawak that is suitable for agriculture has already been converted to oil palm plantations by large companies. The Sarawak Ministry of Land Development website states that there is a land bank of 530,000 hectares of NCR land which stands to be developed for commercial agriculture; its immediate goal is to develop 'at least 120,000 ha of New NCR land areas between 2010-2015 out of the targeted area of 240,000 ha by the year 2020.'¹¹

In Sabah, since oil palm already occupies 90% of land planted with industrial crops (IDS, 2007), any future expansion will either use up the remaining 10% of areas under crops, or expand into lands not under industrial crops such as those claimed under customary rights that are largely used for subsistence agriculture by indigenous communities. Much of the land claimed under customary rights is not yet titled. Some areas are left to fallow under the rotation system of shifting cultivation. According to the SLO of 1930, such lands are considered to be State Land that is 'idle' or unproductive. In 2010, the Sabah Department of Land and Survey (DLS)

9. Reported in The Star, StarBiz, 11 Jan 2010, 'Planters Seek Review of Tax, Cess and Levy'. This Sales Tax is in addition to the Cess paid to the federal Malaysian Palm Oil Board (MPOB) for R&D, Regulation and Promotion of MYR 11.00 per tonne of CPO (USD 3.50).

10. http://www.mlids.sarawak.gov.my/modules/web/page.php?id=47&menu_id=0&sub_id=103 (accessed on 15 March 2011).

11. http://www.mlids.sarawak.gov.my/modules/web/page.php?id=71&menu_id=0&sub_id=135 (accessed on 5 June 2011).

reported that 350,000 hectares of idle land have been identified and would be put into productive use through JV agricultural development schemes.¹² According to the Sabah Chief Minister, the primary intention behind this development thrust is to help local people 'develop the land for agriculture and reap lucrative income to boost their social and economic standards.'¹³ As with Sarawak, oil palm expansion in Sabah is promoted as the main means of bringing development and opportunities to rural communities (IDS, 2007).

Much has changed since the mid-1970s, when the SALCRA schemes were first introduced in Sarawak and the SLDB was established in Sabah – both in the social and physical landscape. Changes have also occurred in institutions, policies and programmes. In Sarawak, for example, a more recent version of the joint venture schemes was introduced in the 1990s and is known as *Konsep Baru* (New Concept). This programme is managed by Sarawak's LCDA. But despite important changes such as the inclusion of private investors and the establishment of a JVC, the basic model is little changed from the older SALCRA model in which oil palm development is 'done' for native customary landowners by companies on a large scale.

Some commentators have argued that top-down approaches to land development relegate local people to the role of 'wage earners rather than land owners', with no role in management and decision-making (Abraham, 2011, writing on Peninsular Malaysia rather than Sabah or Sarawak). For some years now there has been mounting discontent among customary landowners involved in state-sponsored JVs in Sabah and Sarawak (Ngidang, 2003; Cramb and Ferraro, 2010). There are currently more than 200 active cases filed with the lower courts against the Sarawak government and various companies for the alleged appropriation of ancestral land and breach of trust.¹⁴ In Sarawak, the rejection of the JV approach by some native communities has slowed the uptake of new projects on native customary land (Cramb and Sujang, 2011).

Smallholder cultivation of cash crops has long been an integral part of native farming systems in Sabah and Sarawak (Hew, 2011). Responding to incentives to encourage participation in commercial agriculture and leveraging off the infrastructure already developed by larger companies and government investment, many smallholders have seized opportunities to establish their own plantations and small businesses. Consequently, this has resulted in an increasingly important smallholder sector. In Sabah, questions have been raised as to whether the various JV models present the best option in the current setting where independent oil palm smallholders are managing their own agricultural investments. This seems to present a more robust model for poverty alleviation and capacity building (Majid Cooke *et al.*, 2006). In locations where oil palm mills are in place, smallholders are already

12. Discussed in the 2010 PEMANDU Labs. PEMANDU stands for 'Performance Management & Delivery Unit' and is a strategic division within the Prime Minister's Department responsible for charting the national economic development programme.

13. Reported in the Daily Express, 10 April 2011, 'NCR Intact, says CM'.

14. 'Sarawak tribes get OK from court to fight land claims' *Malaysiakini*, March 2011.

motivated to grow oil palm, and only need supplementary assistance in the form of information and training to ensure the quality of fresh fruit bunches (FFBs), keep abreast of current market prices to ensure that they get a fair deal from oil palm mills, and access to quality seedlings and agricultural inputs such as fertiliser and pesticides (Majid Cooke *et al.*, 2006).

In her studies of rural communities in Indonesia, Li (2007) has emphasised the importance of engaging local people as active agents in their own story. People are generally highly responsive to opportunities to improve their livelihoods and to expand their choices. No matter their education levels, they possess the ability to adapt to changing times, incentives and stimuli (Vermeulen and Goad, 2006). And yet, as Li observes, programmes for improvement in contemporary development agendas so frequently contain an element of 'permanent deferral' where '(p)lanned development is premised upon the improbability of the "target group" but also posits a boundary that clearly separates those who need to be developed from those who will do the developing' (Li, 2007: 15). In the case of Sabah and Sarawak, it is increasingly important to be more cognisant of the emerging generation of native landowners that seek to play an active role in developing their land. Consequently, any consideration of agricultural business models needs to view local people as major drivers of change. This has implications for the applicability of older business models.

2.4 Land legislation and legal pluralism

Native claims to customary lands in Sabah and Sarawak are based on complex traditional laws (*adat*), many of which are not formally recorded but are nevertheless applied and held in the collective memory of local communities. The advent of colonial rule in Borneo was to have a profound and lasting impact on issues of land and customary rights. In Sarawak, the self-proclaimed 'White Rajahs' established the Kingdom of Sarawak in 1842 with territory ceded from the Sultanate of Brunei; they ruled until 1946 (Runciman, 1960). Between 1882 and 1946, Sabah (which was known as North Borneo) was a British protectorate under the North Borneo Chartered Company. In the post World War II period, the British continued to govern the two Bornean states until they became part of the Federation of Malaysia in 1963.

The SLO of 1930 and the SLC of 1958 which emerged during the period of British rule were early attempts at codifying aspects of *adat* or customary law, but were not entirely successful at capturing its complexity (Ngidang, 2005; Doolittle, 2001). As the main objective of such statute laws was to make local communities transparent to government, they were static. The Codes that are still used in the post-independence period were devised to facilitate the *territorialisation* of resources (to use an expression proposed by Peluso and Vandergeest, 2001). According to Peluso and Vandergeest (2001), the territorialisation of Southeast Asian forests involved transferring control from a decentralised system of community management to one of a centralised state control through various means like legislation and the use of mapping and other technologies. In this context, the SLC and SLO were

oriented towards 'improving upon' the seemingly disorderly and haphazard practice of shifting cultivation, which is the dominant form of agriculture practiced by indigenous groups in Malaysian Borneo. The intention of the legislator was to lay the foundation for commercial agricultural development, thereby co-opting native peoples into modern agriculture (Doolittle, 2001).

However, to a limited extent these land laws were also conceived to ensure that native communities would not be disenfranchised as other ethnic groups began to assert their interest in agriculture (Majid Cooke, 2003). In Sabah, section 15 of the SLO recognises individual and household rights to Native Titles (NTs) and the rights of communities to apply for shared reserves through Communal Title (CT) (section 76) and for Native Reserves (section 78). In Sarawak, the SLC contains similar provisions to protect customary claims (section 5(2)), but official interpretations of the Code in the present day tend to be ambivalent about recognising 'ownership' of lands under customary claim (Majid Cooke, 2002).

Implementation of the SLO and SLC tells a common story, one of lengthy, bureaucratic and non-transparent procedures as well as a narrow interpretation of customary law. Specifically, in Sabah, insecurity of tenure is a primary problem because of several factors. First, the land titling process in Sabah is complex and can take many years, in some instances more than 20 years (Majid Cooke *et al.*, 2006). Second, fallow lands and secondary forest being largely untitled, are widely interpreted as 'idle land' and subject to potential land use conversion at the discretion of the State. Third, an administrative interpretation of customary rights confers rights only upon lands that have been titled, and not on lands upon which customary rights have been established under *adat* as has been recognised by the Court systems of Sabah, Sarawak and Peninsula Malaysia.¹⁵ Fourth, persons that are considered to be indigenous are permitted to apply for land anywhere in Sabah (such applications are not associated with specific territories). Consequently, overlapping claims are a common occurrence and this situation is commonly faulted for the delays in the issuance of title.

This combination of factors leads to a situation where each year, the DLS reportedly receives 30,000 land applications, out of which only 12,000 are processed.¹⁶ By 2009, there was a reported backlog of 285,000 cases.¹⁷

15. The non-acknowledgment of pre-existing (proprietary) rights has its root cause in a particular interpretation of the SLO. This interpretation views the establishment of customary rights only on proof of occupation or improvement and, furthermore, does not award proprietary rights to the occupier. As an extension of this view all lands unless otherwise titled are State Land. A second line of interpretation and one that is held by some Courts in Malaysia and elsewhere (especially Australia and Canada) is that natives have pre-existing rights regardless of the existence of any document of title. Such decisions are based on common law and are to be found in several Court cases including for Sarawak *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769, and *Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v. Superintendent of Land & Surveys Miri Division, and Government of Sarawak* [2005] 5 MLJ, 305, 311, for Sabah *Rambilin binti Ambit v. the Assistant Collector for Land Revenues, Pitas, No. K 25-02-2002 (High Court of Sabah Sarawak, Kota Kinabalu, July 9, 2007)*, and for Peninsular Malaysia *Sagong Bin Tasi v. Kerajaan Negeri Selangor and Ors* [2002] 2 MLJ 591 as well as *Adong bin Kuwau v. Kerajaan Negeri Johor* [1997] 1 MLJ 412.

16. Daily Express, 6 Aug 2010: p.1.

17. Briefing notes from the State Secretary of Sabah on Communal Title at Lalampas, Tongod District, undated.

Similarly, in Sarawak, in instances of overlapping claims from state and market interests, native claimants are asked to prove that they occupied their lands prior to 1958. From the mid-1970s, a series of amendments were passed that further weaken the provisions of the SLC concerning NCR lands as well as lands that are managed according to *adat* law. In 1974, section 5(3) and (4) granted power to the Minister to extinguish native customary rights after six weeks' notice by publication in the government Gazette or brought to the notice of the persons affected. A new amendment in 1988, section 33(1)(a), imposes a fine if 'land improvements' are not implemented within a three year period, which effectively disregards lands managed under the rotation system of swidden agriculture.

A 1996 amendment places the burden of proving the existence of customary rights on the native claimant; all land would be considered State Land unless proof is shown that customary rights have been established. With the deletion of section 5(f) in 2000, the Land Code no longer recognises 'other lawful means' – i.e., the forms of occupation that are acceptable to the community according to native *adat* laws for the creation of customary rights. And finally, a Land Surveyors Ordinance introduced in 2002 permits only licensed surveyors 'to make, authorise or sign any cadastral map'. In effect this move renders all community-mapping initiatives unlawful. In combination, these changes have had the effect of curtailing the ability of native communities to develop their land by themselves, and privileging land development projects by private companies.¹⁸

The Sarawak government has also been known to issue Provisional Leases to companies for customary lands which have been claimed by native people. Officially, Provisional Leases may be applied to land that has yet to be properly surveyed, or State Land. After the Provisional Lease has been secured, the leaseholder has the right to develop the land but is responsible for conducting a survey to determine existing claims of occupation or cultivation on the land. Any claims may be dealt with either by compensation or by excluding the claimed patch from the area to be developed. In practice, however, the issuance of the Provisional Lease is assumed to give the company a clear title to commence land clearing to develop all the land within the perimeter of the lease (Bian, 2007). This has resulted in cases where native landowners with customary claims on an area under the Provisional Lease only find out about the impending development when bulldozers arrive to clear the land. This has led to conflicts, blockades, violence, and legal suits filed by native landowners (Colchester *et al.*, 2007).

In summary, although the land laws for Sabah and Sarawak contain certain provisions governing the rights of native people to customary lands and communal resources, they were also colonial acts of transformation meant to facilitate the transfer of control over natural resources to a centralised state. With so many obstacles placed before native communities seeking to obtain secure tenure to their customary lands, the pressure on them is acute, and the only avenue to successfully do so seems to narrow to participating in government sponsored land development JV schemes that come bundled with the assurance of title.

18. Pers. comm., Dimbab Ngidang, January 2011.