

## Sarawak: IOI-Pelita and the community of Long Teran Kanan

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The State of Sarawak in Malaysian Borneo is now one of last frontier areas for palm oil expansion left in Malaysia. With most available lands in the Peninsula already planted and most of Sabah already leased out, in Sarawak expansion is accelerating and is estimated to be taking place at some 90,000 hectares (ha) per year. The State already has over 920,000 ha and the Minister for Land Development has plans to double this area to 2 million ha by 2020. About half of this expansion is taking place on lowland peat soils<sup>1</sup> and the rest in the once-forested interior where most land is the ancestral lands of the indigenous Dayak communities.<sup>2</sup> As previous studies have shown there are numerous land disputes between Dayak and oil palm companies throughout the State, and many of these disputes have been taken to court. Although the courts have repeatedly ruled in favour of the Dayak and found that the Sarawak Government's limited interpretation of 'native customary rights' is faulty, yet the State persists in handing out concessions in further violation of communities' customary rights.<sup>3</sup>

This case study looks in some detail at oil palm concessions granted in 1996 to a local joint venture company Rinwood-Pelita on the middle Tinjar river in northern Sarawak which overlaps the customary lands of communities of the Berawan, Kayan and Kenyah peoples. The local enterprise was acquired by the Malaysian transnational palm oil company, IOI, a prominent member of the RSPO, in 2006.

The case is especially important as it not only reveals the complexities of law relating to customary rights recognition in Sarawak but also exposes the problems with four parallel systems of dispute resolution that are at play, including: the company's procedures; the national courts; the RSPO's grievance procedure and; the RSPO's Dispute Settlement Facility. Despite all these efforts, the dispute remains unresolved, 16 years later.

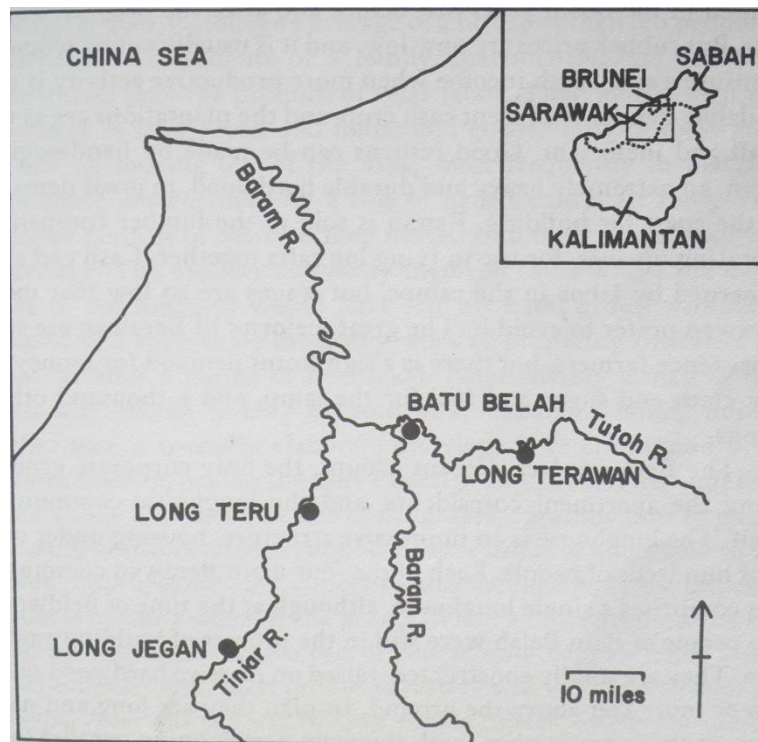
### *Land, Forest and Rivers*

Physiographically, Sarawak is divided into three broad regions: the coastal lowlands, an alluvial, slow-draining and peat-forming coastal plain; an intermediate region of undulating and broken hill country, ranging up to about 300 metres above sea level; and the mountainous interior which extends to the border with Indonesia and reaches up to 2,400 metres at Mount Murud in the north-east.<sup>4</sup> Dulit Land where IOI-Pelita oil palm plantation is located belongs to the intermediate region, intercepted by the Tinjar River and its tributaries, including Sungai Bok.

Sarawak has a climate which is typical of the humid tropics. Mean air temperatures range from 26 to 35 degrees Celcius. The majority of the country has mean annual rainfall of 3,000-4,000 mm and humidity is constantly high. The climate is dominated by the North East Monsoon which starts in November and lasts till March. Inland, the rainfall between March and October is relatively light at 120 to 150mm per month.<sup>5</sup> Excepting the occasional prolonged droughts or excessive rains, the average rainfall pattern provides near ideal climatic conditions for growing oil palms.

The Tinjar River is one of the main tributaries of the Baram River and flows through originally rainforested, hilly lands before joining the Baram River some way below the mouth of the other major affluent to the Baram, the Tutoh River. Named after a local princess, according to local legend, the Tinjar descends steeply from the Usun Apau highlands

between the Baram and Rajang river systems flowing into the Baram and so to the South China Sea.



The Tinjar where the IOI-Pelita oil palm plantation is located, is one of the two major affluents of the Baram river.<sup>6</sup>

The IOI-Pelita licences have been allocated in the foothills of the Dulit Range, a range of hills composed of Miocene limestone, which rise as high as 1,460 metres and run for about 50 kilometres along the south bank of the Tinjar River.<sup>7</sup> These hills used to be almost fully covered with dipterocarp forest, before logging took place in the 1970s, although the lower forests have been worked over through low-intensity indigenous systems of rotational farming by the Berawan since at least the early 20<sup>th</sup> century and by the Kayan since the 1960s, mainly on pockets of alluvial soils and hill slopes near the river banks. Only in 1980s, when Kenyah moved into the area and began to plant cocoa as a cash crop did cultivation move further uphill away from the river bank to more hilly lands.<sup>8</sup> Before the establishment of the oil palm plantations, despite the fact that the primary forests were logged over, a major part of the communities' forests remained intact for hunting and gathering purposes.

### *The Peoples*

Sarawak's population has always been ethnically diverse. The interior remains home to a large number of indigenous peoples, referred to as 'natives' since the colonial era, and now more commonly referred to as Dayaks, who are now mainly Christian having converted from animist beliefs only in the last few generations. Along the coast, the area is mostly populated by Malays, and others like the Melanau and Visayas, who have adopted Islam. Upland Dayaks have practised low intensity, rotational forest farming for several hundreds of years, mostly along the margins of the rivers and streams which, before roads were built, provided the main arteries for trade and communication. Typically, Dayak settlements are situated on the banks of a navigable river and comprise a single longhouse, a very long building traditionally suspended a few feet above the ground on pillars to maintain cleanliness and avoid flooding. Each longhouse is made up of a series of near identical family 'rooms', under

a single long roof, fronted by a shared veranda where meetings, rituals and public life take place, and backed by each family's cooking and cleaning rooms.

These shared communal dwellings, made up of numerous economically independent families, are regulated by common consent through customary laws and traditional institutions. Each longhouse owns a defined village territory, with well-known boundaries, within which individuals and families acquire their own lands by first opening them up to cultivation. Family-owned lands remain in the hands of the family which first cleared them until and unless long abandoned in which case the lands revert to the communal ownership of the village as a whole. Farm lands and forest fallows are heritable being passed, more or less equally, to both sons and daughters remaining in the village, as need arises.<sup>9</sup>

The long term association of the Tinjar river with the Berawan people is noted in the earliest records.<sup>10</sup> The customary chief (*penghulu*) of those Berawan now living in the disputed area claims indeed that the Berawan are among the first peoples in Sarawak, that they have been there for hundreds maybe thousands of years and were the first people to settle the Tinjar, having been in the area prior to the Brooke Raj.<sup>11</sup>

According to their own oral history, the ancestors of the people now living in the disputed area used to live in the very headwaters of the Tinjar in Usun Apau, the highlands between the Tinjar and the Rajang river system to the south. They lived at a place called Paong and then at other village sites known as Long Kuling and Long Lamat, from where they moved down to Long Batang, then Long Tisam and Long Miri, quite near to their current location.

We moved around a lot because of concerns about diseases or attacks. We moved from Long Miri because many people died there.

As recalled by the current *penghulu*, the Berawan moved from Long Miri to their current site Long Jegan before 1915. They still hold a copy of an official letter dated from that time, proving that they were already there. Today, Long Jegan is a community of some 1,000 people living in two locations about a kilometre apart, with 76 rooms (*bilek*) in the longhouse down by the river and another 24 rooms in a second longhouse slightly further up the hillside.

The Kayan, who now make up the majority of the community of Long Teran Kanan, which is about 20 minutes by motorised canoe downstream from Long Jegan, recall that before they moved there they had been living on the upper reaches of the Baram River. In the late 1920s, they were living at Long Kalimau from which they moved by stages to Long Utun where they were during the Japanese occupation. From there they moved to Long Na'ah also on the Baram. In about 1954, they moved to Long Kasih but they had problems farming there as the area was very lowlying and so prone to flooding. They then moved temporarily to the lower Tinjar and by the 1960s were at Bok Batu opposite Long Peking but this area was also prone to floods. It was about this time that the majority of the community converted to Christianity.

Jok Ajeng, one of the oldest residents of Long Teran Kanan recalls the District Officer (DO), who was British, staying the night in their long house at Bok Batu where they explained their problems with the floods. The DO advised them to move upriver to the Berawan area. As Jok recalls, they negotiated several times with the Berawan before finally settling at Long Teran Kanan and a boundary between the lands ceded them and the Berawan was agreed.<sup>12</sup> Recalls another resident:

When we moved here there was no one living here except the Berawan upstream at Long Jegan. Of course, when we decided to come here our leaders and some of the community consulted with the Berawan regarding our intention to come and live here. After getting consent from the villagers we also approached the *penghulu* who also gave consent, as did the District Officer in Marudi. Letters were given in black and white. These are the letters we used in evidence in the court case.<sup>13</sup>

In 1980, some Kenyah long familiar with the Kayan and some intermarried with them also settled in Long Teran Kanan and more of them migrated to the village in 1981 and 1982. The majority of these Kenyah, had come from Long Jeh on the Baram river. Kenyah we interviewed noted that, unlike the Kayan who have a very riverine orientation, they have always been more disposed to live in the upper rivers and deeper forest. So when they settled in Long Teran Kanan and finding that the majority of the easily available farmlands close to the Tinjar and tributary creeks were already cultivated and owned by Kayan families, they expanded their farms further up in the hills, facilitated by the network of logging roads that already criss-crossed the area. Some of these farms were up to two hours walk inland from the community.<sup>14</sup> At that time, the 1980s, the government encouraged them to plant cocoa on their farmlands and the logging roads provided them with easy access to markets downriver in Lapok and then by boat further downstream. Some of the Kenyah recall that they also planted quite a number of fruit trees, including durians.<sup>15</sup>



Old photograph showing a Kenyah ceremonial dance attended by the Berawan *penghulu*. It was at this ceremony that permission for the extension of Kenyah land was affirmed by the *penghulu*

Although the Kayan had invited and welcomed the Kenyah into the community of Long Teran Kanan, the Kenyah were aware that the lands they were expanding into really belonged

to the Berawan. The *penghulu* for the Berawan advised the Kenyah that if they wanted to use the Berawan's lands they should settle in Long Jegan, but the Kenyah recall that they replied 'regardless of where we are, we are your subjects and will help you any way we can.'<sup>16</sup> According to the Kenyah, this tributary labour for the Berawan *penghulu* continued for several years but ceased when he died, some 4 years ago.

In addition an agreement ceremony was held by the Kenyah, attended by the Berawan *penghulu*, which confirmed the agreement for their use of lands in the expansion zone. It was about this time that a permanent road was made into the community which encouraged further expansion of cash crops. Consequently, as the Kenyah admitted, both Kenyah and some Kayan did expand their crops beyond the area agreed and the Berawan again remonstrated with the community of Long Teran Kanan. There were further discussions and another boundary was agreed in 1991, which runs near to the site of the present IOI-Pelita field office. This second agreement was formalised in the form of a letter signed between the Kenyah of Long Teran Kanan and the Berawan of Long Jegan.<sup>17</sup>

However, the Berawan we interviewed claim that the Kayan and Kenyah have since then expanded their farms even beyond this boundary. Our interviews reveal that there do remain disagreements about the exact sequence of events and how much land was ceded to the Kayan and Kenyah, but all parties admitted that there are overlapping land rights and claims, which they need to sort out. The complex web of rights created by this long history of inter-ethnic relations is thus not without its problems. Most interviewees concede that there are overlaps in the land claims of different parties, both between the Kayan and Kenyah of Long Teran Kanan and between them and the Berawan of Long Jegan. However, the main point that interviewees also stressed is that all the area in question is Dayak customary land.

#### *The State and the Administration of Land*

What is now the State of Sarawak had earlier, at least along the coast, been ruled by pre-colonial Malay polities that acted as trade-based entrepots which derived their wealth and power from their control of the regional trade, notably between China and the Middle East, supplemented by the local production of exotic products from the surrounding forests and seas, for which the Malay sultanates depended on forest and seafaring peoples. These coastal sultanates had evolved over some two thousand years 'an amalgam of indigenous, Hindu-Buddhist and Islamic ideas'.<sup>18</sup> Administrative interference in the affairs of upriver communities was minimal.

Under the Brooke Raj, the overall philosophy of the paternalist but not very avaricious State was to curb inter-tribal warfare, improve community welfare, manage natural resources and protect the rights of the Dayak peoples from exploitation.<sup>19</sup> Thus, although Residents and District Officers were appointed to oversee inland areas, the authority of traditional leaders was affirmed and customary law prevailed, although some efforts were made to regularise 'native courts' and even to codify customary law. As detailed elsewhere,<sup>20</sup> these norms of governance were continued without great change when power was transferred first to the British colonial government in 1946 and later to the independent Government of the State of Sarawak, as part of the Federation of Malaysia, in 1963.

As a result, Sarawak still has a plural legal system whereby native custom is recognised and upheld in the Constitution. The customary authorities of village heads (*tuai rumah or tua kampung*), regional chiefs (*penghulu*) and paramount chiefs (*pemancha and temongong*), are

also recognised by the Sarawak Government and receive a small stipend for their services in maintaining the rule of law, both administrative and customary.<sup>21</sup>

With respect to land, the situation is more complicated. On the one hand, the successive administrations have recognised customary law, upheld customary rights ('Native Customary Rights' (NCR)) and sought to protect natives from land markets and takeover by outsiders. Hence so called Native Customary Areas and Native Customary Lands are not open to purchase by non-natives. On the other hand, governments have also sought to limit shifting cultivation, decried the perceived wastefulness of traditional systems of land use and thus sought to restrict the extension of NCR. The long-term goal has been to encourage natives to settle down, acquire land title and thus free up land for development by other interests.

The 1958 Land Code, the key piece of colonial law which continues to regulate land in Sarawak, thus explicitly sought to limit the extension of NCR. Surprisingly this controversial law was passed without significant discussion in the legislature.<sup>22</sup> The law set a cut off date, 1<sup>st</sup> January 1958, after which no new native customary rights could be accorded without permit. Moreover, the same year, an administrative circular was issued instructing District Officers not to give permission for the felling of virgin jungle, thereby further restricting the extension of rights.<sup>23</sup> In fact, however, such permits were issued in some districts right through the 1960s.<sup>24</sup>

Since the current chief minister Taib Mahmud came to power in 1981, his Government has made extensive changes to the Land Code and other land laws to support its policy of promoting large-scale commercial land development. Taib's new creation, the Land Custody and Development Authority (LCDA), was explicitly designed to bring Native Customary Land into the sphere of commercial land development.<sup>25</sup> To get around the restriction on acquisition of native customary lands, the LCDA was accorded legal personality as a 'native'. Moreover, the Land Code (Amendment) Ordinance of 1994 broadened the scope for the resumption of land by the government. Section 46 thus enabled the government to resume land, not just for public purposes, but in order to make the land available for large-scale private land development.<sup>26</sup>

In 1996, the Land Code was again amended to allow the Director (Lands & Survey) to extinguish native customary rights over a given area by issuing a directive in the Government Gazette and one newspaper, exhibited at a notice board of the district office, with 60 days to submit a claim for compensation. The burden of proof with respect to NCR was placed on the native claimant against the presumption that the land belongs to the State.<sup>27</sup> And in 1998, a further Amendment allows the state cabinet to make rules for the assessment of compensation payable for the extinguishment of native customary rights.<sup>28</sup> It is these laws which have so complicated the IOI case, as detailed below, as they apparently give the State the power to unilaterally extinguish native customary rights in favour of private sector land development.

The Administration's increasingly restrictive interpretation of NCR has long been contested not only by the Dayaks but also in the courts. In line with international human rights laws and the common law legal traditions which Malaysia took over from the British, the Malaysian Courts have repeatedly found against the Government (both in Sarawak and in the Peninsula) and affirmed that NCR derive from custom and endure so long as they have not been explicitly extinguished through due process of law and fair compensation.<sup>29</sup>

A further complication which needs mention is that through the promulgation of the forestry laws, also periodically amended, the State has given itself increasing power to set aside lands as Forests of various kinds. In 'Forest Reserves', no customary rights to land can be established or exercised, and pre-existing rights in these area are thus subject to extinguishment, through due process of law and compensation. In 'Protected Forests', on the other hand, limited rights of access are allowed. 'Communal Forests' are reserved for the use of a particular local community.<sup>30</sup> The forestry laws also give the Forest Department the power to issue licenses for logging, as well as to revoke Communal Forest by a process of notification in the government Gazette.<sup>31</sup> Consequently rather than extending Communal Forests to encourage community forest management, the Communal Forests have been progressively reduced since the 1960s.<sup>32</sup>

#### *Administration in the Tinjar*

The communities in the Tinjar have had a long interaction with the administrative apparatus of the State. Since the early years of the 20<sup>th</sup> century, when the Brooke Raj began to extend its authority over the Baram and its upper tributaries, administrators have overseen settlements, approved community plans to relocate their longhouses and intervened to resolve disputes between communities. As noted above, and as elucidated in detail in the court proceedings summarised below, the Residents in Miri and District Officers in Marudi, were closely involved in the decisions of the Kayan and then the Kenyah to relocate from the Baram to the Tinjar and to settle at Long Teran Kanan, and they made sure that the Berawan were consulted and approved the moves.

Moreover, as the court judgment on this very case and mentioned below also highlighted, the Administration gave ample other indications, even incentives, to the community that they accepted their presence in the area. They local Administration provided Long Teran Kanan with a school, a clinic, assistance with water supplies, agricultural subsidies and other services.

In 1951, a large part of Dulit Land was gazetted as the Bok Tisam Protected Forest. Interviewees recall that in the late 1960s there were discussions with forestry officials about the legality of their presence in the area, but in the end they were allowed to remain, while more recent relocatees, such as an Iban settlement near Lapok, were moved out. As one Kayan resident noted:

When we first moved into the area we got approval from the government and since then the government has provided a school and subsidies for agricultural development and other facilities like rainwater tanks. This reflects their recognition of our presence here, so we can't understand why they then gave our land to the company and now are appealing the judgment. This we cannot accept. We want our lands meaningfully recognised and respected.<sup>33</sup>

#### *The Companies move in*

Through procedures that are opaque to us, the status of the area as a Protected Forest was lifted and the area opened up to logging in the 1970s. Interviewees in Long Jegan recall that Rimbunan Hijau and another company, Rich Venture, began logging their lands in the 1970s.<sup>34</sup> Interviewees down at Long Teran Kanan recall a logging company called Bok Tisam Timber operating in their area. The community negotiated with that company 'which agreed to pay us a commission for the timber extracted, so we agreed to it. It did not create a great problem as we had enough farmland and hunting and fishing was still alright.'<sup>35</sup>



In 1996 and 1997, LCDA (Pelita) in a 30:70 joint venture with Rinwood Sdn Bhd acquired Provisional Leases for some 7,840 ha of land, including the two lots which have been contested, named as Lot 3 and Lot 8 totalling 3,024 ha. The leases were granted by the Lands and Surveys Department, following the filing of required documents including an Environmental Impact Assessment (EIA), which was approved by the Government. Later the company secured an additional 2,200 ha, apparently without the required EIA, increasing its total holding to 9,040 ha. The two lots at the centre of the land dispute are located within the Dulit Land District on the left bank of the middle Tinjar River, at Tajong Teran, Sungai Metegai and Long Teran Kanan. Long Teran Kanan is about 120 kms or 3 hours drive by four wheel drive from Miri, the capital city of the Division.

When the community heard that the company had secured a lease on their lands, some community leaders approached Rinwood-Pelita and sought assurances that their crops and farmlands would not be affected. However, the company then began to develop its palm oil estate apparently without further consultation with the communities and without compensating farmers for the loss of their lands or the clearance of the crops which included cocoa, rubber, pepper and other crops.<sup>36</sup> The first that the community knew what was going on was when the bulldozers began clearing their cocoa and durian trees.<sup>37</sup>

There were actually no dialogues. They never approached us about their intention to open up our land for plantation. They came in and straight away started opening up our lands with their machines... The community went to see them and inform them, and said they were not happy by the way the company had come in and they said they did not want the company to affect their lands. But the company did not respond: they ignored our request. They went ahead and opened up our lands, our farms and private lands, where we had many fruit trees.<sup>38</sup>

Recalled the Kenyah headman:

Some of the womenfolk really cried when they saw the destruction.<sup>39</sup>

Other villagers recall that efforts were made to stage peaceful protests but these also were ignored. They also took their concerns to the Lands and Survey Department, the District Officer and their elected political representative but to no effect. That is when they took legal advice and decided to take their case to court (see below).

Because there did not seem to be any concrete response to our concerns, we pressed ahead with the court case. We did not want to be branded as anti-government just because we tried to protect our land. The government never wanted to look into the problem.<sup>40</sup>

Some farmers notably the Kenyah, who farmed further inland than the majority of the Kayan, recall losing extensive areas of cocoa farms to the company.<sup>41</sup>

All my plants were bulldozed by Rinwood in the 1990s. I had about 3,000 cocoa trees which were cut. There was no real consultation. Sometimes they just bulldozed on Sundays when there was no one around as people were in church. Some people did get compensation but others did not. Like me, I got no compensation.<sup>42</sup>

The company continued to expand its operations. By that time, we were told, a number of community members had planted their own oil palms in their remaining farmlands and some

recall tense encounters with company personnel. In one case, one farmer recalls, company personnel came accompanied by ‘mafia types’ and told him to move off his land, threatening that they would burn his house and oil palms if he did not give way. The following day, despite being challenged by thugs on motorbikes, he went to the local police station. But he reported:

of course they [the police] could not do anything, they just belong to Rinwood and are not supporting us, so I went to see the SAO in Bakong. He also could not settle this case and said go to Lands and Surveys.<sup>43</sup>

### IOI Corporation

IOI as it is commonly known was incorporated on 31 October 1969 as Industrial Oxygen Incorporated Sdn Bhd. It is one of Malaysia’s larger home-grown business conglomerates which started off as an industrial gas manufacturing enterprise. It ventured into property development in 1982, followed by oil palm plantations in 1985. As of June 2009, IOI Group employs more than 30,000 personnel of more than 23 different nationalities in 15 countries.<sup>44</sup> Over its 30 years of existence the company has diversified into a large transnational company with interests in plantations, property development, investment and manufacturing. Its acquisition of the Dutch refining company Lodders Crokkaan also gives it direct entry to the food industry retail and manufacturing ends of the palm oil supply chain in Europe, while IOI Edible Oils also manufactures processed palm oil products in Sabah.<sup>45</sup>

The Group’s pre-tax profit of RM 2,863.6 million for FY2011 was 12% better than the previous year whilst net earnings improved by 9% to RM 2,222.9 million. Plantation division earnings were up 33% at RM 1,497.8 million.<sup>46</sup> The Group is currently headed by Tan Sri Lee Shin Cheng, the executive chairman, listed by Forbes in 2012 as the 4<sup>th</sup> richest person in Malaysia and worth a reported US\$5.2 billion.<sup>47</sup> Lee and his family’s control of IOI Corporation is held via Progressive Holdings Sdn Bhd. Although all of Lee’s children work for the company, sons Dato’ Lee Yeow Chor and Lee Yeow Seng are given more prominence as seen in their representation in IOI Corporation Berhad board of directors.<sup>48</sup> Plantations are IOI’s biggest income generator, making at June 2009, about 65 per cent of the conglomerate’s profits. The group operates 152,000 hectares of oil palm plantations in Malaysia and 83,000 hectares in Indonesia. In Malaysia, IOI has 12 palm oil mills with total milling capacity of 4.1 million tonnes per year supplied mainly from its 80 estates.<sup>49</sup>

IOI is a long-standing member of the Roundtable on Sustainable Palm Oil. To date, seven of the Group’s mills and associated estates have been awarded the RSPO compliance certification, comprising of 40 estates covering 50% of the Group’s planted area. The Group is also pursuing certification by the International Standard for Carbon Certification (“ISCC”). The ISCC System GmbH Certification supports lower greenhouse gas emissions and the use of sustainable biomass products. To date, two of the Group’s estates and palm oil mills have been certified under ISCC.<sup>50</sup>

In September 2006, IOI acquired the shares from Rinwood Oil Palm Plantation and the JV company was renamed IOI Pelita Plantations Sdn. Bhd. IOI acquired 9.1 million shares or 70% equity interest in the JV company for RM 21.3 million cash. In this venture into Sarawak, IOI Group executive chairman Lee Shin Cheng promised ‘to bring in its superior planting materials, expertise, best practices and technology into RP Miri’s plantation while at the same time ensuring greater environmental sustainability.’<sup>51</sup> As of 29<sup>th</sup> February 2012, IOI Pelita Plantations claims to own a gross area of 9,040 hectares with a planted area of 4,269 hectares, barely enough to supply a single medium-sized mill.<sup>52</sup>

Another Kenyah who had secured a job with the company also found they were expanding operations onto his lands. When he objected, company personnel reportedly told him:

We can promote you if you surrender your lands. But I replied, 'I do not want your promotion. This land is very important to me'. Then they threatened us with police and gangsters. We replied that it seems you have not come in good faith but have come as a robber with no intention to work with us for our benefit. We refused to give up an inch of our land. I was dismissed [from employment] the very same day.<sup>53</sup>

In group discussions, women emphasised that the damages resulting from the operations had not only meant the loss of cash crops but had also caused a loss of rice fields. Access to medicinal plants had been reduced and water courses polluted. They also noted their concerns about careless use of pesticides, with used containers being left around and not properly disposed of. Small water courses where women used to collect small fish, snails and other products, some of which they used to sell, have also been badly affected. 'There used to be many of them, but the streams have been badly affected by the tractors'.<sup>54</sup>

In September 2006, Rinwood-Pelita was acquired by IOI Holdings (see box) and registered as IOI-Pelita Plantations Sdn Bhd. As part of its due diligence in acquiring the property IOI took note of the fact that the affected communities were disputing Rinwood-Pelita's Provisional Leases in the courts.<sup>55</sup> The company took legal advice allegedly from the ex-Attorney General for Sarawak who reassured IOI that the communities' claims were without foundation.

Some changes in the local company's approach may have resulted from IOI's takeover of Rinwood-Pelita. However even before IOI's acquisition of the company, Rinwood-Pelita had been settling claims with quite a few members of the community.<sup>56</sup> After IOI took over the procedure seems to have been modified. The company continued expanding its plantations within the two estates up until 2009. It claims that it paid compensation to customary owners for as much as 300 ha of land.<sup>57</sup> Ceremonies were reportedly carried out both at Sejap (Lot 3) and Tegai (Lot 8) while these compensation payments were handed over.<sup>58</sup> Community members interviewed during this study noted that the compensation paid was quite minimal (between US\$ 50 -130 per ha) and corresponded to the crops and improvements on the land not for the land itself, while those receiving compensation were pressured to not try to reclaim their lands. IOI-Pelita did not settle claims to the much wider areas previously taken over by Rinwood-Pelita and is also accused of having cleared other forested lands which were collectively owned by the community and of importance as water catchments and for the collection of forest products.<sup>59</sup>

### *Court proceedings*

In 1997, after efforts by the community of Long Teran Kanan to persuade the company to withdraw from their lands had failed, the community, represented by four named plaintiffs, filed a case in the High Court in Miri against LCDA (Pelita), Rinwood and the Government of the State of Sarawak Government.<sup>60</sup>

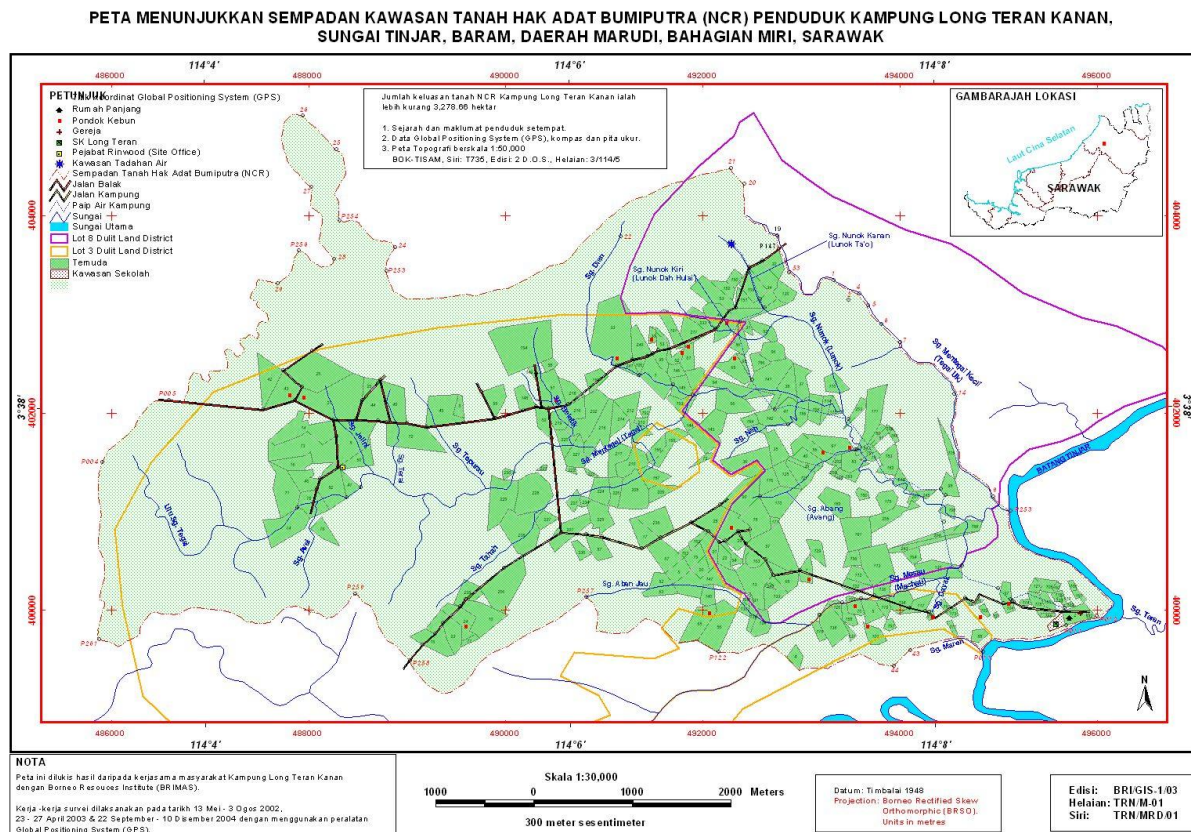
The community sought a judgment:

- recognising their customary rights over their lands, which rights should not be impaired by the government
- that the issuance of a lease over their lands was therefore 'bad'
- that the issuance of the permit violated three provisions of the Federal Constitution guaranteeing their rights to life, to property and to equality before the law

- that the company was therefore trespassing on their lands

They also sought a directive from the court to the Department of Lands and Surveys to cancel the lease, give vacant possession to them as the customary owners and to issue injunctions against the company to cease its operations and stop entering the communities' lands. They also sought exemplary and aggravated damages from the company and payment of legal costs.

Despite the urgency of the case, as the company was already at that time beginning to clear lands and establish its plantations, the court took over 12 years to make a judgment, which was only finally given on 25<sup>th</sup> March 2010.<sup>61</sup> Consistent with other judgments from the Malaysian courts and the guarantees in the Malaysian Constitution to life and property, the judge ruled that the community of Long Teran Kanan does indeed hold Native Customary Rights to the area claimed, that their rights to these lands have not been extinguished, that the provisional leases issued over the land are therefore null and void and the company is trespassing. The judge also ruled that the company should pay exemplary and aggravated damages and costs.



Map accepted by the court showing the lands of the community of Long Teran Kanan. Collective lands are shown in pale green and family farms in brighter green: the total areas accepted by the judge as customary land is 3,279 ha.

In making this judgment, the judge recognised that the members of Long Teran Kanan had acquired rights in the area through a traditional transfer of customary rights from the Berawan of Long Jegan. He found that the community had been given very clear reasons to believe that its presence was accepted by government officers, who had agreed to their settlement at the site and who had subsequently established a school and a clinic in the village and

provided agricultural subsidies for the residents to develop crops on their lands. Their rights were therefore acquired in ways consistent with the Sarawak Land Code. The judge also ruled that even though the area had been declared the Bok Tisam Protected Forest in 1951, this had not extinguished the Berawan's prior rights, which were later transferred to the Kayan and Kenyah.

The judge also noted that the Government had accepted through its endorsement of the company's 1996 Environmental Impact Assessment, which the company had given a legal undertaking to follow, that the community of Long Teran Kanan should be compensated for any lands lost to the plantation and should be allowed to stay in the area. Such compensation had not been provided. The judge was explicit that the company therefore had 'no right to enter, clear or develop or occupy or to remain' in the disputed area.<sup>62</sup> All these elements of the judgment are consistent with international human rights law which recognises indigenous peoples' rights to the land they have traditionally owned, occupied or otherwise used.

Controversially and falling well below the RSPO standard, the judge did, however, uphold the right of the State to issue leases and extinguish rights without according the people 'the right to be heard'. Even more controversially, considering that these circumstances were largely the result of the tardiness of the court to reach a judgment, the judge decided not to issue the requested injunctions against the company on the grounds that the company had now 'undertaken the development of the claimed area'.<sup>63</sup> Instead he ruled that the company should provide compensation to the communities for damages to their lands and crops and for the losses incurred since 1997 through being deprived of the use of their lands.

Despite its ambiguity, the judgment was widely celebrated by NGOs and in the press. The Borneo Resources Institute of Malaysia highlighted the inconsistencies in the Government's approach noting that when the national oil company, Petronas, had built an oil pipeline across the same community's lands, the Lands and Survey Department had compensated the customary owners.<sup>64</sup> Yet the same Lands and Survey Department has consistently denied that the same community has Native Customary Rights in its dealings with Rinwood-Pelita-IOI.<sup>65</sup>

As for the Berawan of Long Jegan, there were discussions in 1997 that they also be a party to the suit against LCDA, Rinwood and the Government of the State of Sarawak but they chose not to be.<sup>66</sup> In 2004, the community of Long Jegan revised its opinion and decided that they did have a case. The lawyer representing Long Jegan then explored the option of a joint suit with the Kayan and Kenyah of Long Teran Kanan but this was felt impractical by the lawyer for Long Teran Kanan.<sup>67</sup> Accordingly, the Berawan of Long Jegan filed a separate claim against the company alleging that the operations of Rinwood-Pelita overlap some 2,800 ha. of their customary lands. However, the case was later withdrawn as the map they had submitted outlining their customary area was considered not to be accurate enough as the basis for a land claim. According to the Berawan of Long Jegan, a revised map is being prepared with the help of a local indigenous organisation, and their case is to be reactivated.<sup>68</sup> The Berawan are claiming rights over most of what is now called Lot 3 (as well as some of Lot 8 and Lot 17)<sup>69</sup> of the IOI-Pelita estate. As no inclusive participatory mapping has yet been undertaken to clarify these matters, the extent to which the lands the Berawan claim overlap the lands recognised by the court as now belonging to Long Teran Kanan is unclear, although the lawyer for Long Jegan states that the overlap is minor.<sup>70</sup>

### *Activating the RSPO Complaints System*

Under the RSPO's Code of Conduct, producer members are expected to have a time bound plan for producing certified palm oil in compliance with the RSPO's Principles and Criteria (P&C). Recognising that this may take some time but in order to prevent companies certifying model holdings while their other operations are in clear violation of the RSPO standard, the RSPO also has a Partial Certification Requirement requires:

- (b) a time-bound plan for achieving certification of all relevant entities is submitted to the certification body during the first certification audit. The certification body will be responsible for reviewing the appropriateness of this plan (in particular, that the time scale is sufficiently challenging), and verifying and reporting on progress in subsequent surveillance visits; *and*
- (c) **there are no significant land conflicts**, no replacement of primary forest or any area containing HCVs since November 2005, no labour disputes that are not being resolved through an agreed process and no evidence of non-compliance with law in any of the non-certified holdings (emphasis added)... Certificates for all of the company's holdings shall be suspended if there is noncompliance with any of these requirements.<sup>71</sup>

As an RSPO member, IOI is thus required to resolve the land conflict in IOI-Pelita in line with both the RSPO P&C and Partial Certification requirement before it seeks certification of any of its holdings.

It is important to note that representatives of the community of Long Teran Kanan and supportive NGOs had made repeated efforts to engage with IOI and its subsidiary IOI-Pelita to address the land conflict. Moreover, as early as July 2008, the lawyer representing the community of Long Teran Kanan conveyed the concerns of the community to the RSPO Executive Board. Noting that efforts were underway to settle their dispute with IOI-Pelita out of court, the lawyer proposed that a joint survey be undertaken to:

...determine the extent of their cultivated areas ie their gardens and farmlands within the boundary of the two raeas of the provisional leases ie Lot 3 and Lot 8 Dulit Land District of IOI. My clients want their cultivated areas to be excluded therefrom. Additionally, they want compensation from IOI for all the damages done to their land and crops. The lawyers for the State Government are all for an out of court settlement.<sup>72</sup>

The case came back to the RSPO's attention by January 2009, when RSPO was asked to approve the certification of another IOI operation in Sandakan, Sabah. Invoking the Partial Certification requirement, NGOs contended that the operation in Sabah could not be certified because of the serious problems with IOI operations in Ketapang in West Kalimantan, Indonesia and the unresolved land dispute in Sarawak. The RSPO Secretary General thus engaged in a correspondence with NGOs supporting the community of Long Teran Kanan to try to clarify the relationship of the case to RSPO procedures. While it was recognised that there was a land conflict, the RSPO Secretary General contended that since a court case was underway this meant that a dispute resolution process was being 'attempted' and so certification of the operation in Sabah could proceed. The Secretary General conceded, however, that:

If, however, there are other claims which are not being resolved, either by direct negotiations or through court processes, then partial certification will not be possible.<sup>73</sup>

The indigenous organisation, SADIA, clarified to the RSPO that indeed there were ongoing unresolved disputes, that land had been taken without Free, Prior and Informed Consent and that the community was still actively resisting planting. SADIA urged RSPO not to proceed with partial certification of IOI, as otherwise 'the mechanism/system (RSPO) will not be acceptable to the indigenous peoples'.<sup>74</sup> This issue was to rumble on for the next three years, and is still unresolved, but we can note now that RSPO still has no definition of 'significant land conflict'.<sup>75</sup>

Between 2009 and 2010, RSPO Executive Board debated internally how it would address the problem. Some NGO members of the Board argued that it was clear that IOI-Pelita was in breach of the RSPO's requirements under the P&C to recognise the community's customary rights and that IOI was evidently in violation of the partial certification requirement that there be 'no significant land conflict' in its holdings. On the other hand, company members of the Executive Board argued that IOI had 'done everything in its power to organise for a solution that is reasonable and mutually acceptable'.<sup>76</sup> The community continues to contest this assertion, feeling that its rights remain unrecognised.

In November 2009, community representatives and NGOs held a dialogue with IOI representatives during the RSPO's Roundtable meeting in Kuala Lumpur in 2009.<sup>77</sup> A further meeting then took place in the IOI-Pelita estate office in Sarawak on 17<sup>th</sup> November 2009.<sup>78</sup> In this latter meeting, which included Berawan representatives, the community and the company agreed to settle the dispute through compensation and, according to the report of the independent auditor asked by IOI to facilitate the meeting, IOI made a 'commitment to dispute resolution through a process that is understood and accepted by all parties'.<sup>79</sup> The meeting minutes noted:

IOI promised it will not make an appeal if it loses the case. In addition, IOI gave assurance that even if it won the case, it will not simply grab the land forcefully, but will pay ex-gratia compensations to the respective persons based on the size of land and type of planted crops, and according to the compensation procedure that has been set up by Pelita.<sup>80</sup>

Progress to implement this accord was, however, slow. In March 2010, the NGOs and community representatives again wrote to the IOI expressing concerns about the unresolved dispute and copied the RSPO Executive Board. This then formally triggered the RSPO Grievance Procedure.<sup>81</sup> The court then issued its judgment on the case, as summarised above, confirming the rights of the community of Long Teran Kanan and also calling for settlement through compensation.

However, IOI, Pelita and the Government of the State of Sarawak then filed appeals against the judgment with the Miri High Court. On the 3<sup>rd</sup> April 2010, IOI issued a press release announcing its appeal.<sup>82</sup> This was considered to be in bad faith by the NGOs and the communities, given that the company had given a firm undertaking to settle out of court. This prompted the communities and NGOs to file detailed complaint direct to the RSPO Executive Board. Accordingly, a field study was carried out in August 2010 which was written up as a detailed report and submitted to the RSPO on 10<sup>th</sup> November 2010.<sup>83</sup>

The RSPO had recognised the need for complaints procedures during the early definition of its standard. The RSPO's 'Principles and Criteria' (P&C) make it a requirement of all RSPO member companies to have mechanisms to receive complaints and to resolve disputes

through mutually agreed dispute resolution procedures. Likewise, the RSPO-accredited companies (so-called 'Certification Bodies') that issue certificates of compliance with P&C based on field audits are also required to have complaints procedures in case parties dispute the findings of audits. At the same time the Executive Board of the RSPO itself has been open to receiving complaints since 2007, but a formal Complaints System did not really become functional until 2010, at which time a Complaints Panel, comprising 4 members of the Board and one independent member, became active.<sup>84</sup>

A first task of this Panel was to establish norms for the Complaints System. These were published on the RSPO website in early 2010 and set out the procedure by which the RSPO secretariat receives complaints, looks into the legitimacy of each complaint, if necessary contracting outside expertise to make assessments, and reports to the Board or the Complaints Panel, which considers the situation and makes decisions by consensus.<sup>85</sup> The Panel is currently chaired by the representative for Oxfam International. So far this Panel has received 6 complaints, of which the IOI case has been among the most testing.<sup>86</sup>

The IOI-Pelita case was again considered at the June 2010 meeting of the RSPO Executive Board, which urged the company and the community to settle out of court.<sup>87</sup> However, there was a lack of progress in resolving the dispute. Acrimonious communications were exchanged in the press between NGOs and IOI and, despite a series of meetings,<sup>88</sup> there was a corresponding lack of progress in resolving the issue on the ground. In October 2010, IOI issued a statement claiming that it had met with community representatives and their lawyer but they did not clarify the damages they were claiming. IOI also highlighted the fact that the land claims of the community of Long Teran Kanan overlapped those of the Berawan community of Long Jegan.<sup>89</sup> On 13<sup>th</sup> December 2010, community representatives met with IOI staff and an IOI Board member to discuss a process for resolving the dispute, a meeting which at IOI's request was chaired by the Resident of Miri.<sup>90</sup> The community representatives met afterwards on the same day and agreed the compensation they were claiming. The claim was forwarded to IOI on 16 February 2011.<sup>91</sup> However, although the company never formally responded to this compensation claim, it transpires that IOI-Pelita found the claim 'too excessive', which is why it declined to settle.<sup>92</sup> Instead, it demanded a list of names of all the claimants.<sup>93</sup> In the absence of any substantive response to their concerns from either IOI-Pelita or the RSPO Complaints Panel, the NGOs and community signatories filed a further complaint to the RSPO President on 21<sup>st</sup> March 2011.<sup>94</sup>

In view of the further complaint and the lack of progress with resolving the complaint, the RSPO Complaints Panel eventually considered the case in late March 2011. It issued a letter to IOI on 30<sup>th</sup> March 2011, a position which was endorsed by the RSPO Board the following month. A statement was then posted on the RSPO website which stated that the company was in breach of the RSPO Code of Conduct for members and the RSPO Certification System. The RSPO suspended the further certification of all IOI operations and required that within four weeks the company come up with a solution to the problems raised in the complaints that would, preferably, be mutually agreed.

In response to this statement, IOI announced its willingness to reach an agreement and said it would work closely with the RSPO (although not with the complainants) to develop a plan to this effect.<sup>95</sup> For their part the community also made clear that they were open to a settlement as long as the company withdrew its appeal.<sup>96</sup> IOI did not withdraw its appeal, a matter the IOI Complaints Panel chose not to contest, but it elaborated its own proposal for resolving the conflict but, according to the complainants, the company did not approach the community to



discuss this proposal. The proposal was released on 5<sup>th</sup> May and the company called a meeting in Miri to discuss it on 9<sup>th</sup> May. Community representatives attended but apparently no consensus was achieved. On 17<sup>th</sup> May the community asked that a follow up meeting be adjourned and that an independent mediator be appointed to put in place a mutually agreed process for negotiation.<sup>97</sup> Although we surmise that IOI did come up with a plan there is no copy on either the IOI or RSPO websites and we can only infer its contents based on NGO responses to it.<sup>98</sup> The lack of transparency in the process at this time was confusing to the complainants.

The community wrote to the RSPO on 18<sup>th</sup> May 2011 reaffirming its willingness ‘to address the dispute through a mediated settlement based on the Miri High Court decision. Based on this, IOI must recognize out native customary rights, the pre-existing right to our land so that dialogue can be started.’<sup>99</sup> In its submission, the community set out very clearly how the community would like a settlement to proceed, which would include IOI Pelita dropping both its appeal and its other actions through the courts (see below). The community also stated that:

LTK community is committed to achieving a long lasting resolution that can be celebrated. The community wants to be a good neighbour to IOI Pelita and is willing to assist the company in obtaining RSPO certification. The community respects the Miri High Court judgment. LTK community would like an out-of-court settlement [to] result in a structured and institutionalized solution and it reiterates its willingness to negotiate and amicably settle the matters at hand out-of-court.<sup>100</sup>

Informal communications between IOI and RSPO ensued, and RSPO also communicated with NGOs to ascertain their views. In July 2011, IOI filed a Revised Solution Plan with the RSPO, which was also not made publicly available but which was shared with the community headman.<sup>101</sup> Under this plan IOI recognised that there were competing claims between Kayan, Kenyah and Berawan to the disputed lands. It agreed to defer its appeal while negotiations were pursued and to withdraw its appeal once a settlement was reached. It also invited the involvement of the RSPO’s Dispute Settlement Facility (DSF).

The Plan also set out proposed terms for a two-stage process to be followed by the DSF mediator. In the first phase, the mediator would ensure agreement among the affected parties on a negotiation process including mutual agreement on the mediator, goals, scope, rules of engagement, representation and timelines. Once the mediator had established the basis for a negotiation, IOI proposed a sequence of actions to arrive at an agreement which would include participatory mapping<sup>102</sup> to ‘arrive at a jointly agreed list of disputed lands and the owners and users that potentially need to be compensated’ and then final settlement through compensation and through other actions to address other community concerns notably the environmental impacts. According to an article on the Neste Oil website, RSPO issued a further press release about the case in September 2011, but the press release has since been deleted from the RSPO website and it is not in the RSPO press compilation for 2011.<sup>103</sup>

#### *Further legal complications*

What also becomes clear reviewing this dispute is that the High Court’s contradictory judgment of March 2010 has sown confusion. On the one hand, the judgment had unambiguously stated that the company’s leases were null and void, that the company was trespassing on the communities’ lands and that it had ‘no right to enter, clear or develop or occupy or to remain’ in the disputed area. From the community’s point of view therefore, it is clear that the company should vacate their lands. Yet at the same time the judge had declined

to cancel the company's leases or issue an injunction preventing company access, giving the company grounds for arguing that it was not excluded from its plantations, so long as it proceeded to pay the required compensation. Adding to the confusion, IOI, Pelita and the Government, when they had appealed the judgment had not asked for a 'stay of execution' (ie a suspension of the judgment pending the appeal hearing). This means that until and unless the appeal court rules otherwise, the contradictory situation introduced by the judgment prevails.

Frustrated by the lack of progress in getting compensation for their losses as ordered by the court in March 2010, a year after the judgment, in March 2011, members of the community began harvesting fruits from the companies' oil palms planted on the lands that the judge had clearly ruled belonged to the community. The company then alleged that the community was preventing its workers having access to its estates and filed several reports with the Marudi police alleging theft of fruits.<sup>104</sup> For its part, the community also filed complaints with the police against the company for trespass and for driving dangerously past the demonstrations. After several tense stand offs<sup>105</sup> and in order to avoid further disputes, the company decided to withdraw its staff from the Sejam and Tegai Estates (Lot 3 and Lot 8).<sup>106</sup> In April 2011, the company filed for injunctions, which were granted by the courts, preventing seven named persons in the community from entering their estates.<sup>107</sup> Since this did not appear to halt the harvesting of fruits by all of the community members, the company has since pursued contempt proceedings. These legal processes were still underway during our visit in June 2012.

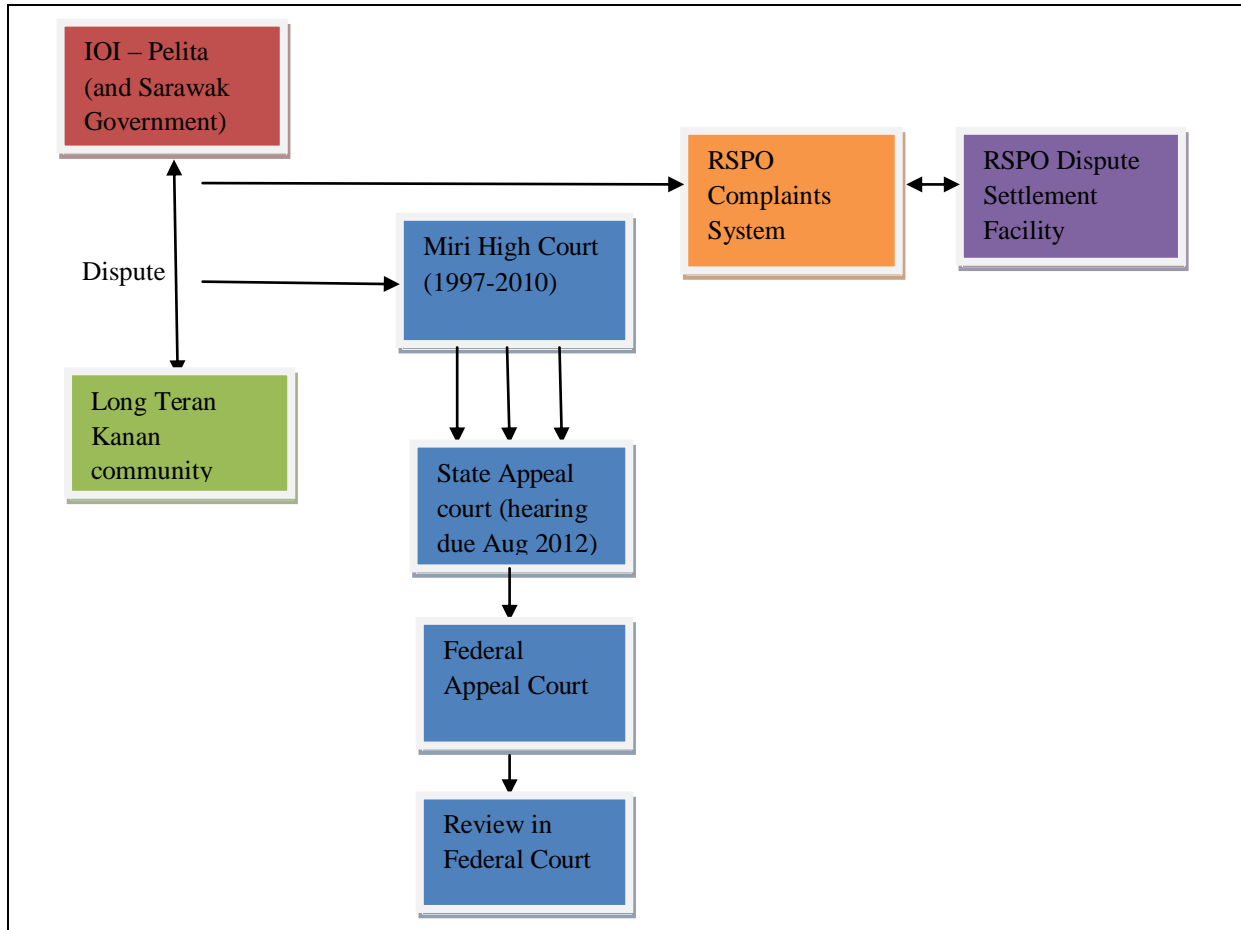
*RSPO Dispute Settlement Facility:*

In view of the difficulties being encountered by the community and company in reaching a settlement and responding to both the company and the community's requests for a mediator, on 26<sup>th</sup> May 2011, the Complaints Panel sought the assistance of the RSPO's newly established Dispute Settlement Facility (DSF).

The DSF is an initiative promoted by several NGO and company members of the RSPO and later embraced by the RSPO Executive Board, which is designed to complement the Complaints Panel and help RSPO members to resolve disputes. As noted on the RSPO website:

RSPO is seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a complaints process on fair, informed and respectful terms. Those who may face particular barriers to access can be provided assistance through the RSPO Dispute Settlement Facility.

The DSF had been set up to 'provide means for achieving fair and lasting resolutions to disputes in a more time efficient and less bureaucratic and/or legalistic manner [than making recourse to the courts], while still upholding the RSPO requirements including compliance with relevant legislation'. The DSF works to help companies comply with the relevant parts of the P&C related to dispute resolution and requires the mutual consent of all parties. The DSF thus seeks to recruit an approved mediator with suitable qualification who, acting in accordance with the RSPO standard, seeks to develop a 'dispute resolution process acceptable to both parties'.<sup>108</sup> In practice, the IOI case is the first essay of the DSF process and so the procedures for the effective functioning of the facility are, in fact, still in development.



Simplified diagram summarising the relationship between the different dispute resolution mechanisms in play in the IOI-Pelita case

In July 2011, the RSPO contracted an Australian consultant with a background in conflict mediation to set up a negotiation process for the case. After holding a series of consultations with company and community representatives during October 2011, a mediation process was partially agreed by the company and by the majority of community members involved, which included a ‘holding agreement’ binding parties to certain actions while a final agreement was negotiated. This ‘holding agreement’ included:

- suspending actions through the courts
- monthly payments of money to the community for three months
- provision of services to the community in terms of road repair and transport for students and,
- in return, resumed access to the estate by the company for harvesting and plantation maintenance.<sup>109</sup>

The mediator identified a list of issues in contention that would need to be resolved by means of the negotiation process but he also identified certain obstacles to the dispute resolution which included the fact that a minority faction within the community was unwilling to halt the harvesting of palm oil fruits. There was also a lack of agreement about how eventual compensation monies should be repaid.<sup>110</sup> In the event, although IOI did ask the court for an adjournment of its appeal,<sup>111</sup> the ambitious terms of the ‘holding agreement’ were not acceptable to all parties and became an impediment to any negotiation even starting.

In January 2012, IOI wrote a letter to the RSPO, which was not copied to the complainants, summarising its views about the mediation process, in which it expressed the opinion that:

Given the fact that different groups have competing NCR claims over the same pieces of land, it is impossible for IOI to negotiate with individual groups, for this will not diminish the conflicts as long as the fundamental question remains unanswered of the legitimacy of those claims.<sup>112</sup>

The company further stated:

Now that the situation on the ground has proven not yet ready for mediation, the company has no alternative but to return to the courts.

The company also stated that it was still willing to pay compensation to the original parties 'subject to them furnishing the relevant information and evidence.'

IOI is of the view that the RSPO grievance panel should review our current suspension.

In March 2012, IOI's lawyers wrote to the Miri High Court asking for the appeal case to be reactivated.<sup>113</sup>

In April 2012, alarmed by IOI's return to the courts, NGO complainants sent a further letter to the RSPO, which was endorsed by the community and copied to IOI. In a section of the letter titled 'RSPO's vanishing credibility', the complainants noted that they were dismayed and disillusioned by the way the RSPO's Executive Board and Grievance Panel had bent its own rules to accommodate corporate interests, and had 'stopped due communication and consultation with the complainants. After four years we are forced to conclude that RSPO's Grievance Procedure is compromised.'<sup>114</sup>

Following further discussions of the case at the Complaints Panel and at the RSPO Executive Board, on 3<sup>rd</sup> May 2012 RSPO issued a second public letter about the dispute. Noting the lack of a resolution but that in its view 'the mediation approach is not fully exhausted', the RSPO announced a six month period for the final resolution of the dispute. During this period the suspension of further certification would be limited to Sarawak only, allowing the company to proceed with the certification of its other operations. It also recognised the continued willingness of the community to reach a settlement. The letter also 'requested' the disputants to follow an 8-point action plan which would address the obstacles to mediation and move towards a mediated solution.

The RSPO stated that, if after 6 months the parties had not jointly signed a time bound plan to resolve their differences, the RSPO would determine whether the community and the company had 'exhausted all reasonable communication efforts to sit around the same table and sign'. If it felt the community was at fault it would lift the suspension but if it felt the company was at fault it would suspend the certification of IOI's operations.<sup>115</sup> On 7<sup>th</sup> May the community representative responded to the RSPO noting that the community 'is always ready for negotiation and looking forward for the Grievance Panel and DSF further step.' On 16<sup>th</sup> May, IOI also responded affirming its willingness to proceed along the lines suggested.<sup>116</sup>

*Recent developments:*

In an effort to break the log jam, since May 2012 NGOs have used funds donated for conflict resolution from the Stichting Doen to recruit a consultant expert in palm oil to advise the communities on ways forward. An independent lawyer from Universiti Malaya was also contracted to assess the situation. There have been numerous visits to the community by various parties and concerted efforts to engage with the RSPO Secretary General and DSF.

The lack of progress in resolving the dispute had by then become a matter of public controversy in Europe. In December 2011, the Dutch news programme Zembla broadcast the findings from its own investigation of the situation, concluding that Oxfam, as Chair of the RSPO Complaints Panel, was responsible for the delays and was being unduly lenient to IOI.<sup>117</sup> Oxfam was obliged to make a public statement clarifying its role. Noting that the ‘Panel also imposed an ultimatum of 6 months’, Oxfam stated that ‘[S]hould a solution not be found before it ends, the RSPO will suspend all new applications of IOI for an RSPO sustainability certificate.’<sup>118</sup>

Interviews with the various parties during June and July 2012, suggest that despite all these efforts the situation has barely changed. The Assistant Manager for the IOI-Pelita operation says that IOI is still waiting for the lawyer acting for the community to furnish IOI with a full list of the persons to be compensated. He asserts that the community is still preventing IOI-Pelita from having access to the estate. So, ‘to keep things cool’, IOI has refrained from entering the disputed area since March 2011. The efforts of the DSF mediator having stalled, IOI is now waiting for suggestions from the RSPO on what the next steps will be. It is the view of local IOI staff that the March 2010 judgment leaves the company in possession of its estates and the ‘natives do not have the right to the land. I think the natives were misled by the lawyer’. The IOI staff interviewed also believes that the demands of the community members are unreasonable:

They want everything. They want the land back and they want compensation. They want to take back all the estate properties, even the buildings.<sup>119</sup>

The company is therefore appealing the judgment on the grounds that as the natives accessed the area after the 1958 freeze on the issuance of Native Customary Rights, they cannot claim rights over the land. The IOI spokesperson asserted that the company would rather settle out of court but that it is not the only party to the case and both the Government of the State of Sarawak and Pelita are also parties to the appeal.<sup>120</sup> When we interviewed the appeal lawyer acting for IOI and Pelita, he noted that while a settlement out of court was possible there was no guarantee that all the appellants would withdraw their appeals. The State of Sarawak is represented in the case by its own lawyers.<sup>121</sup>

***Conclusions and Recommendations:***

Of course, we feel very bad and ashamed when we think of how we are treated by the Government and the company. It has taken so long and still we have not received compensation for the losses incurred and we are still in a situation that is unresolved.

Kalang Anyi, Long Teran Kanan<sup>122</sup>

*Persistent violations of the RSPO standard*

The IOI-Pelita case is both simple and yet complicated. IOI, as a long-standing member of the RSPO and a member of its Executive Board, is bound to uphold the RSPO standard and

the company is thus proceeding with the certification of its operations. The RSPO standard is explicit that it requires companies to respect the legal and customary rights of local communities. It requires respect for customary rights above and beyond what national laws and procedures may or may not require and it requires that no lands be acquired from legal or customary owners without their free, prior and informed consent.

It is obvious to any objective observer of this case that the Rinwood-Pelita operation, which IOI acquired in 2006, had been developed without respect for the Dayak peoples' customary rights and without FPIC. Moreover, after it took over the operation, although informed of the land conflict, IOI-Pelita chose not to respect customary rights and to dispute the claims of the local communities. To this day, IOI staff continue to deny that the communities have customary rights in the area and the company seeks only to compensate the communities for their losses of fruit trees and other crops. Even after the Miri High Court ruled in favour of the community of Long Teran Kanan asserting they that they do enjoy NCR in line with the Constitution, the company has appealed the ruling. Although, for a time, IOI was persuaded by the RSPO to suspend its court action and seek an out of court settlement, a course of action it has made repeated statements that it prefers, yet it has reactivated its appeal. It is clear that this appeal has become a major obstacle to any resolution of the conflict as it has sown mistrust and a feeling in the community that the company is acting in bad faith. The further legal actions against named community members for allegedly harvesting fruits on the contested lands has served to further inflame the dispute.

The IOI-Pelita operation is a Joint Venture company. Its operating partner LCDA (Pelita) is a State-owned enterprise. Although a minority shareholder (30%), Pelita has itself filed an appeal against the ruling, it continues to dispute the communities' customary rights and it evinces little understanding or knowledge of the RSPO or its standard. Neither Pelita officials nor its lawyer are able to provide assurances that the company would withdraw its appeal even if IOI chose to do so.

Although it continues to contest the legitimacy of the community's land rights, IOI-Pelita has been persuaded by the RSPO to seek a resolution of the conflict. Again the RSPO standard sets out very clearly the basis and procedures by which disputes should be resolved, and which must be followed when a company's 'right to use the land is legitimately contested by local communities with demonstrable rights'.<sup>123</sup> This requires *inter alia*:

- participatory mapping of the disputed area (not done);
- that necessary action has been taken to resolve the conflict (not yet done);
- that there is a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties (not done);
- that the system resolves disputes in an effective, timely and appropriate manner (not done);
- that this dispute resolution mechanism should be established through open and consensual agreements with relevant affected parties (not done);
- that any negotiations concerning compensation for loss of legal or customary rights are dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions (not done);
- that procedures are established for identifying legal and customary rights and for identifying people entitled to compensation (not done);
- that a procedure for calculating and distributing fair compensation (monetary or otherwise) is established and implemented (not done).

In sum, it is clear that IOI-Pelita Plantations Sdn Bhd is in serious violation of all these provisions of the RSPO P&C. The persistence of these violations should mean that all the company's certificates are invalid under the partial certification requirement.<sup>124</sup>

*Deficiencies of the RSPO Complaints System and Dispute Settlement Facility*

The RSPO Executive Board has been aware of the land dispute between the community and IOI-Pelita since 2008 and the issue became a matter of contention over the Partial Certification requirement in 2009. Since the formal appeal to the Grievance Procedure in 2010, the RSPO, through its Executive Board, then through the Complaints Panel and with the support of its newly established Dispute Settlement Facility, has sought to encourage a resolution of the dispute. We have detailed the course of action taken, based on interviews and all the available information, as faithfully as possible.

Given that the dispute remains unresolved over four years since it formally came to the RSPO's attention, an inescapable conclusion is that the RSPO's procedures are both tardy and ineffective. The NGO complainants are also of the strong view that the Complaints Panel, heavily influenced by the Executive Board, has been unduly lenient to IOI.<sup>125</sup> It is hard to disagree. The RSPO delayed ruling on the violation of the partial certification requirement for over two years. Even when it did rule that the company was in violation, it only suspended *future* certifications and did not suspend existing certificates.

The RSPO Complaints System emphasises that 'Transparency should be the rule, confidentiality the exception'. However, our research shows that very few documents relating to this case are actually available or even logged on the RSPO website. Moreover, none of the documents issued by RSPO itself have been made available to the communities in Malay.

Another serious problem also emerges from this study. While the RSPO Complaints System and the DSF Protocol are explicitly aimed at ensuring compliance with the RSPO P&C, the advice and actions of both bodies, albeit unintentionally, have not made this explicitly clear in further communications with the various parties, including IOI-Pelita, the DSF mediator and the communities. It may be objected that the need for compliance with the RSPO P&C was obvious and understood by all. However, it seems that in fact this was not understood even by RSPO staff. IOI does not understand that it has to recognise rights based on custom. Pelita does not have knowledge of the RSPO standard. The community members interviewed were not informed of the most important required steps of an RSPO Dispute Resolution procedure (as bulleted above). Even, the two stage process to start a negotiation proposed by the DSF mediator is not consistent with the dispute resolution process set out in the RSPO P&C. Arguably, even if the DSF had brokered an agreement between IOI-Pelita and the community of Long Teran Kanan, the company would still be in violation of the P&C, if it ever sought certification.<sup>126</sup>

Our field interviews identified a number of further reasons why the initial mediation process under the DSF was not successful. The first was that contrary to the DSF Protocol, which requires that the costs of mediation be borne jointly by all parties, the RSPO Secretariat had arranged for IOI to pay the full costs of the mediator.<sup>127</sup> Consequently community parties were suspicious of the mediator's independence. Secondly, it seems that the TORs for the mediator were not widely discussed in the community (although they were shared for comment with the headman), which unfortunately compounded the community's sense that the mediation was one-sided. Thirdly, the mediator did not interview many of the NGO complainants and the lawyers representing the communities to ascertain their views. Finally,

again, none of the RSPO and IOI documents relating to the case were translated into Malay, except the holding agreement, meaning that relatively few community members have been able to understand the details of what has been going on.

The RSPO is clearly important as an initiative that seeks to address land conflicts in a fair way by recognising indigenous peoples' and communities' customary rights, even where these have not been recognised under statutory law. The question arises, however, of whether the RSPO as presently constructed has the capacity to address land conflicts effectively. In response to the question whether the slow rate of progress by the Complaints Panel in dealing with this complaint was due to lack of resources, lack of clear procedures or a lack of consensus in the Panel, the Chair of the Panel replied that:

... it was in part all these things but it was also in large part due to a lack of capacity in the RSPO Secretariat so far to deal with complaints adequately. In my view, for the Complaints Panel to be successful the Secretariat eventually will need to be strengthened so that it has the capacity and skills to operationalise the procedure, in support and only referring key decisions to the Panel. Currently this capacity is not completely there and so the burden has been falling back on the Panel to move things on. The same is true of the Dispute Settlement Facility which really needs to be run in a way that is sufficiently independent of both companies and communities. To date, NGOs have largely had to fill in for the Secretariat in trying to make the DSF operational. So an improved flow chart, funding and procedures are by themselves necessary but not enough. There is a need to really build capacity and have the right number of quality people in the RSPO Secretariat. There are also problems of lack of expertise in the Panel itself. I don't want to blame the secretariat but looking ahead in order (for the RSPO) to deal with an increasing number of these complaints constructively you can't rely on a bunch of volunteers on a panel. As Panel Chair I don't mind saying that we may have made mistakes or made judgments that were incomplete or even wrong, and maybe we have been too easy on the various parties, as a bunch of well-intentioned but volunteer amateurs. None of the members of the Panel is fully experienced in dealing with land conflicts and complaints like this.<sup>128</sup>

For their part, IOI, Pelita, the DSF mediator and advisers to the DSF<sup>129</sup> have all laid the blame for the lack of progress with dispute resolution on the fact that there are divisions within the communities both about process and about overlapping land claims. These differences do exist as we have carefully noted above. However, emphasis of this problem overlooks the more fundamental reason that progress has stalled which is that IOI-Pelita (and associated Government parties) are refusing to accept that the communities have customary rights to the land. They are doing this through appeal to the courts and in contempt of the RSPO standard.

One final concern needs highlighting. The RSPO P&C make clear that companies need to respect customary rights and take actions to resolve disputes. The purpose of the Complaints System and DSF are to oblige and assist companies to resolve such problems. However the involvement of the RSPO and DSF does not mean that companies themselves are no longer expected to take active steps to resolve disputes. On the contrary, as the RSPO's letter of 3<sup>rd</sup> May 2012 makes clear, the company and the community were given a six month ultimatum to take steps to resolve matters. It is thus especially concerning that IOI staff imply they are now waiting for the RSPO to find a solution.

A number of recommendations flow from these findings and conclusions.



## RSPO

RSPO EB, Complaints Panel, DSF and Secretariat all need to make consistently clear that all actions they and other parties take must be in line with the RSPO P&C.

The RSPO also needs to clarify unambiguously what constitutes a ‘significant land conflict’ for the purpose of Partial Certification and what must be done to determine that a dispute resolution mechanism is ‘mutually agreed’.

Much more needs to be done to ensure full transparency about complaints, submissions and RSPO statements. This can readily be done in a way that shows that the RSPO is openly accepting and sharing information from all parties without implying that RSPO is partial or favouring any particular point of view.

All RSPO communications should be translated into the national language, in this case Malay, to facilitate comprehension and make available both the originals and the translations to the communities.

The RSPO Secretariat must itself adhere to the DSF Protocol in contracting parties.

For this case, the DSF mediation needs to be restarted in full compliance with the DSF Protocol and strictly in line with the RSPO P&C to ensure the possibility that the end result is an operation compliant with them.

The RSPO needs to maintain clear distinctions between the work of its constituent parts. The Complaints Panel must be more independent from the Executive Board to which it reports. It should conduct its deliberations without Executive Board interference and then make recommendations to the President for consideration by the Board. Likewise the Dispute Settlement Facility must be run independent from the Complaints Panel. The Complaints Panel should take account of the outcomes of the DSF process but not make surmises about the progress or otherwise of the DSF while the dispute remains unsettled.

More resources and qualified personnel need to be allocated by the RSPO to these elements – the DSF, the Complaints Panel and the Secretariat – for them to run effectively.

## IOI-Pelita

IOI needs to ensure that its staff and own senior management understand the RSPO standard. It also needs to train its minority joint venture partner, Pelita, about the RSPO standard and instruct Pelita to adhere to this standard.

IOI-Pelita must respect the customary rights of the local communities, instead of contesting their claims as it has now done for over 5 years.

IOI and Pelita must withdraw their appeals to the High Court.

IOI and Pelita must make clear that they accept that the communities have the right not to cede their customary lands to the company.

IOI must clarify who will represent IOI-Pelita in negotiations with the communities and who has the authority to make binding agreements with them.

### Communities

The communities need to identify who is representing them in negotiations.<sup>130</sup>

The various community representatives, including their attorneys, should agree a mechanism for resolving conflicting claims among the different Dayak families, groups and communities.

The communities need to clarify how compensation will be shared, taking into account that some lands are family farms and some lands are communal and taking into account that some parties have received partial compensation already.

### Both

Both parties should now progress through the steps for conflict resolution set out in the RSPO P&C.

This should include participatory mapping and agreement on these maps by all customary claimants through inclusive community consultations.

Negotiations should then proceed and should result in agreements on:

- compensation for damages including loss of income since 1997:
  - compensation for past losses and damages to family owners
  - compensation for losses and damages to collective rights areas and watersheds/ drinking waters
- rehabilitation of affected watersheds and remediation for other environmental impacts noted in the original complaint and raised in subsequent discussions
- With respect to land, negotiations should explore a full set of options, including:
  - sale of lands to the company, which should be subject to community (not just individual) consent
  - rental of lands to the company, which should be subject to community (not just individual) consent
  - allocation of planted lands as small-holdings where land owners ask for that and agree with terms
  - return of lands where consent is not given.

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## Endnotes

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- <sup>1</sup> Butler 2011.
- <sup>2</sup> Colchester, Wee, Wong and Jalong 2007.
- <sup>3</sup> Ibid.
- <sup>4</sup> Cramb (citing Jackson 1968 and Lee 1970) 2007:37.
- <sup>5</sup> Hamid 1984:4.
- <sup>6</sup> Source of map: Metcalf 1991:15.
- <sup>7</sup> The Oxford University Expedition to Sarawak 1932. See: <http://www.jstor.org/discover/10.2307/1786960?uid=3738672&uid=2134&uid=2&uid=70&uid=4&sid=56306683313>
- <sup>8</sup> Group interview with Kenyah, Long Teran Kanan, 25 June 2012.
- <sup>9</sup> Interview with Jok Ajeng, 24 June 2012, Long Teran Kanan.
- <sup>10</sup> Metcalf 1991.
- <sup>11</sup> Interview with Patrick Jelaman, 25 June 2012, Long Jegan.
- <sup>12</sup> Interview with Jok Ajeng, 24 June 2012.

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- <sup>13</sup> Interview with Kalang Anyi, 24 June 2012.  
<sup>14</sup> 2<sup>nd</sup> Interview of Lenjau Ngerong, 25 June 2012.  
<sup>15</sup> Interview of Lenjau Ngerong, 24 June 2012.  
<sup>16</sup> 2<sup>nd</sup> Interview of Lenjau Ngerong, 25 June 2012.  
<sup>17</sup> Letter of agreement signed between Kenyah and Berawan, 16 May 1991 (photographs recorded).  
<sup>18</sup> Andaya 2011:129.  
<sup>19</sup> Mooney 2011.  
<sup>20</sup> Hong 1987; Colchester 1989.  
<sup>21</sup> Colchester, Wee, Wong and Jalong 2007.  
<sup>22</sup> Mooney 2011.  
<sup>23</sup> Porter 1967, in Cramb 2007: 225.  
<sup>24</sup> Cramb 2007: 225.  
<sup>25</sup> Colchester, Wee, Wong and Jalong 2007; Cramb 2007: 228.  
<sup>26</sup> Cramb 2007: 229.  
<sup>27</sup> Colchester, Wee, Wong and Jalong 2007:15.  
<sup>28</sup> Cramb 2007: 229.  
<sup>29</sup> Bulan 2011; Colchester, Wee, Wong and Jalong 2007.  
<sup>30</sup> Cramb 2007: 224.  
<sup>31</sup> IDEAL 1999.  
<sup>32</sup> Hong 1987: 77.  
<sup>33</sup> Interview with Kalang Anyi, 24 June 2012.  
<sup>34</sup> Interviews in Long Jegan, 25 June 2012.  
<sup>35</sup> Interview with Kalang Anyi, 24 June 2012.  
<sup>36</sup> BSi 2009.  
<sup>37</sup> Interview with Lenjau Ngerong, 24 June 2012.  
<sup>38</sup> Interview with Kalang Anyi, 24 June 2012.  
<sup>39</sup> Interview with Lenjau Ngerong, 24 June 2012.  
<sup>40</sup> Interview with Kalang Anyi, 24 June 2012.  
<sup>41</sup> Interviews in Lapok and Long Teran Kanan, 23-24 June 2012.  
<sup>42</sup> Interview with Baya Sigah, 23 June 2012.  
<sup>43</sup> Ibid.  
<sup>44</sup> [http://en.wikipedia.org/wiki/IOI\\_Group](http://en.wikipedia.org/wiki/IOI_Group)  
<sup>45</sup> [www.rspo.org/en/member/62](http://www.rspo.org/en/member/62)  
<sup>46</sup> IOI Corporate Berhad annual report 2011, see [http://www.ioigroup.com/Investor/ioicorp/2011\\_AR.pdf](http://www.ioigroup.com/Investor/ioicorp/2011_AR.pdf)  
<sup>47</sup> [http://www.forbes.com/lists/2012/84/malaysia-billionaires-12\\_Lee-Shin-Cheng\\_HZCA.html](http://www.forbes.com/lists/2012/84/malaysia-billionaires-12_Lee-Shin-Cheng_HZCA.html)  
<sup>48</sup> [http://en.wikipedia.org/wiki/IOI\\_Group](http://en.wikipedia.org/wiki/IOI_Group)  
<sup>49</sup> [http://en.wikipedia.org/wiki/IOI\\_Group](http://en.wikipedia.org/wiki/IOI_Group)  
<sup>50</sup> Chairman's statement, IOI Annual Report 2011, see [http://www.ioigroup.com/Investor/ioicorp/2011\\_AR.pdf](http://www.ioigroup.com/Investor/ioicorp/2011_AR.pdf)  
<sup>51</sup> <http://www.ioigroup.com/Newsroom/newsroom.cfm?id=1277F881-13D3-0253-BA11305AE2325F70>  
<sup>52</sup> <http://www.pelita.gov.my/about%20us.html>  
<sup>53</sup> Group Interview in Long Teran Kanan, 24 June 2012.  
<sup>54</sup> Ibid.  
<sup>55</sup> BSi 2009.  
<sup>56</sup> Moody 2011:7.  
<sup>57</sup> BSi 2009: 200 ha had been compensated by 2009. By 2010 the area compensated for was said to be 300 ha. (IOI 2010).  
<sup>58</sup> Moody 2011:7.  
<sup>59</sup> Grassroots 2010. Interviews with community members 23-26 June 2012.  
<sup>60</sup> Judgment of Suit No. 22-59-97 (MR)  
<sup>61</sup> Ibid.  
<sup>62</sup> Ibid at para 56.  
<sup>63</sup> Ibid at para 65.  
<sup>64</sup> BRIMAS 2010a; BMF 2010.  
<sup>65</sup> Moody 2011:7.  
<sup>66</sup> Interview with Harrison Ngau, 27 June 2012.  
<sup>67</sup> Interview with Baru Bian, 10 July 2012.  
<sup>68</sup> Interviews with Penghulu Patrick Jelaman, 25 June 2012, Tua Kampung Francis Ubi, 27 June 2012, and Nicholas Mujah of SADIA, 10 July 2012.  
<sup>69</sup> Moody 2011:16.

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- <sup>70</sup> Interview with Baru Bian, 10 July 2012.
- <sup>71</sup> RSPO 2007 at para 4.2.4. An amended Partial Certification requirement was adopted by the RSPO Executive Board without consultation with the membership on 3 March 2011. The revised text now reads: ‘Land conflicts, if any, are being resolved through a mutually agreed process, e.g. RSPO Grievance procedure or Dispute Settlement Facility, in accordance with RSPO criteria 6.4, 7.5 and 7.6.’
- <sup>72</sup> Email from Harrison Ngau 28 July 2008.
- <sup>73</sup> Email exchange between Dr. Vengeta Rao of RSPO and Tenaganita and then SADIA between 17 July 2009 and 25 July 2009.
- <sup>74</sup> Ibid.
- <sup>75</sup> In fact, the Partial Certification requirement is that the phrase ‘that are not being resolved through an agreed process’ refers to labour disputes and not the, earlier mentioned, land conflict.
- <sup>76</sup> Email correspondence between RSPO Secretary General Dr Vengeta Rao and Executive Board members 4-6 February 2010.
- <sup>77</sup> The NGO complainants again met with IOI in the margins of the following RSPO Roundtable in November 2010.
- <sup>78</sup> Grassroots 2010.
- <sup>79</sup> BSi 2009 in: Grassroots 2010, Annex 4, page 75.
- <sup>80</sup> BSi 2009:2.
- <sup>81</sup> The RSPO website logs the complaint as being activated on 17 March 2010. The RSPO ‘Grievance Procedure’ was later renamed the ‘Complaints System’.
- <sup>82</sup> Grassroots 2010 Annex 3.
- <sup>83</sup> Grassroots 2010. Date confirmed by email by Andrew Ng of Grassroots, 15 July 2012.
- <sup>84</sup> The need for a complaints procedure first became apparent in 2006 when the RSPO was appealed to resolve a dispute between plantation workers and the Indonesian company Musim Mas. A formal Grievance Procedure was adopted by the RSPO Board in January 2007. For the next three years, complaints were handled by the Secretary General in liaison with the Board. An independent Complaints Panel was instituted in early 2010 and became effective from August 2010 (Johan Verburg pers. comm. 15 August 2012).
- <sup>85</sup> [http://www.rspo.org/en/complaints\\_system\\_introduction](http://www.rspo.org/en/complaints_system_introduction)
- <sup>86</sup> The complaint against IOI actually comprise two separate concerns, the first about the land dispute related to IOI-Pelita and the second about the environmental impact of IOI’s operation in Ketapang, West Kalimantan, Indonesia. This study only examined the first part of this complaint.
- <sup>87</sup> There is no public record of this communication.
- <sup>88</sup> Moody (2011:8) lists 4 further meetings between IOI and the communities or other parties on 7 May 2010, 10 November 2010, 13 December 2010 and 9 May 2011.
- <sup>89</sup> IOI Press Release 29 October 2010: IOI Corporation Bhd’s Statement in response to The Nut Graph’s article titled ‘Holding IOI Accountable’.
- <sup>90</sup> BMF et al. 2011:8.
- <sup>91</sup> Moody 2011:8.
- <sup>92</sup> Moody 2011:8. The report states that the community was claiming RM3.00 per tree per month for the 13 years that the company had been illegally in occupation of their lands. A verbally conveyed offer of RM 0.6/tree/year x 13 years was also considered ‘still excessive and not acceptable’ by IOI-Pelita (Moody 2011:9).
- <sup>93</sup> BMF et al. 2011:8.
- <sup>94</sup> Ibid.
- <sup>95</sup> IOI Statement 11 April 2011 available at: [www.ioigroup.com](http://www.ioigroup.com)
- <sup>96</sup> Moody 2011:16.
- <sup>97</sup> BMF et al. 2011:9.
- <sup>98</sup> RSPO also sent a letter to the parties on 4 May 2011 but a copy is not publicly available.
- <sup>99</sup> Letter from Kampung Long Teran Kanan to RSPO Secretariat, 18 May 2011.
- <sup>100</sup> BMF et al. 2011:10.
- <sup>101</sup> Julia Majail email 2 August 2012.
- <sup>102</sup> Earlier in 2011, there had been discussions between the community and IOI about participatory mapping but these had not reached consensus (Eric Wakker pers. comm. 23 July 2012)
- <sup>103</sup> <http://www.rspo.org/files/images/2011%20NR%20Report%20FINAL.pdf>
- <sup>104</sup> Moody 2011:16.
- <sup>105</sup> Offer 2011a:3.
- <sup>106</sup> Interview with William Elevation, IOI (Miri Office), 26 June 2012.
- <sup>107</sup> Interviews with communities and IOI, 23-26 June 2012.
- <sup>108</sup> [http://www.rspo.org/en/dispute\\_settlement\\_facility](http://www.rspo.org/en/dispute_settlement_facility)
- <sup>109</sup> Offer 2011a:1.

- <sup>110</sup> Offor 2011a and 2011b.
- <sup>111</sup> IOI 2012a.
- <sup>112</sup> IOI 2012a.
- <sup>113</sup> Kadir, Wong, Lin and Co 2012.
- <sup>114</sup> Letter from Milieudedefensie and 14 other NGOs to RSPO dated 19 April 2012.
- <sup>115</sup> Letter from RSPO to IOI and complainants:  
<http://www.rspo.org/file/RSPO%20letter%20to%20IOI%20LTK%20sNGO%2020120503.pdf>
- <sup>116</sup> IOI 2012.
- <sup>117</sup> [http://zembra.vara.nl/Nieuws-detail.2624.0.html?tx\\_ttnews\[tt\\_news\]=62096&cHash=062fe54f7f3619ef1f681732bce09235](http://zembra.vara.nl/Nieuws-detail.2624.0.html?tx_ttnews[tt_news]=62096&cHash=062fe54f7f3619ef1f681732bce09235)
- <sup>118</sup> Oxfam 2012.
- <sup>119</sup> Interview with William Ellevenson, IOI (Miri Office), 26 June 2012
- <sup>120</sup> Ibid.
- <sup>121</sup> Interview with KY Ling, 27 June 2012.
- <sup>122</sup> Interview of Kalang Anyi, 24 June 2012.
- <sup>123</sup> RSPO Principles and Criteria 2.3, 6.3 and 6.4.
- <sup>124</sup> RSPO, Certification Systems 4.2.4
- <sup>125</sup> Letter from Milieudedefensie and 14 other NGOs to RSPO dated 19 April 2012
- <sup>126</sup> RSPO members are required to develop a plan for the certification of all their operations. However, under the RSPO Certification System, the unit of certification is 'the mill and its supply base'. At the moment the IOI-Pelita operation in Tinjar lacks a mill and sells its fruit to another company, Rimbunan Hijau, which is not a member of the RSPO.
- <sup>127</sup> IOI paid these costs to the RSPO and the RSPO DSF contracted and paid the mediator. Email from Julia Majail 2 August 2012.
- <sup>128</sup> Interview with Johan Verburg of Oxfam 9 July 2012.
- <sup>129</sup> Teoh Cheng Hai 2012.
- <sup>130</sup> The authors advise that the community complainants consider involving the different factions within the Kayan group and ensure direct representation by the Kenyah. They should consider inviting the Berawan to observe negotiations.