

# Preliminary findings from a Review of the Jurisdictional Approach initiative in Sabah

*Case study* June 2020 | Marcus Colchester<sup>1</sup>

In 2015, Sabah announced its commitment to achieve jurisdictional certification by 2025 of all palm oil production in line with the RSPO standard.<sup>2</sup>



The initiative was largely driven by the leadership of the Sabah Forestry Department at that time with the technical support of the RSPO Secretariat and Forever Sabah, a local non-profit initiative. Since then, the jurisdictional initiative has received what amounts to substantial financial support from a variety of sources and for different aspects of the work including the State of Sabah, RSPO, AAK, Unilever, Moore Foundation, Packard Foundation, UNEP, WWF and HSBC<sup>3</sup> as well as in-kind contributions from several organisations and individuals. The initiative is coordinated by the Jurisdictional Certification Steering Committee (JCSC), membership of which is comprised equally of Government agencies, private sector companies and NGOs, with the RSPO Secretariat and Forever Sabah acting as technical advisors.<sup>4</sup>

RSPO has developed a voluntary standard for the 'sustainable' production of palm oil (or fresh fruit bunches in the case of small and medium producers) that goes beyond what is required by law in many countries. RSPO member producers' compliance with this standard is verified through 3rd party audit and the issuance of certificates by accredited Certification Bodies. One of the main challenges for jurisdictional approaches to palm oil certification is to clarify how compliance with the RSPO standard will be incentivised and enforced for **non-RSPO members** within the jurisdiction. In effect, this is a process of translating a voluntary standard into mandatory requirements within the jurisdiction's policy, legal and institutional systems.

In the Sabah context, this has been a topic of active consideration since the State Cabinet's endorsement of the commitment in November 2015 made it State policy. Discussions about how to address key issues such as FPIC in the State's legal and institutional frameworks are taking place accordingly at the State level.

At the time that Sabah and other jurisdictions - such as Indonesia's district of Seruyan in Central Kalimantan and province of South Sumatra - first announced their plans to achieve jurisdictional certification, RSPO had not published any system for ensuring compliance, verification and certification of non-RSPO-member producers. Consequently, the jurisdictional pilots such as that in Sabah have been seeking to develop their own systems without a template against which to measure progress and towards which to target their efforts. While the jurisdictional approach initiatives are home-grown affairs, the somewhat piecemeal nature of JA pilots to date can thus be, at least partly if not largely, explained by the lack of clear leadership from RSPO.

After RSPO members raised concerns about this gap, the RSPO Board agreed on the need to establish a Jurisdictional Approach Working Group (JAWG) which is now in the process of developing a Jurisdictional Certification Systems Document (JCSD) in consultation with RSPO members.<sup>5</sup> Forest Peoples Programme is a member of RSPO and of JAWG and has carried out these reviews of the JA pilots in order to make better informed inputs to JAWG and JCSD. FPP's studies were designed to complement the review undertaken by the consultancy New Foresight, which was commissioned by RSPO to review the RSPO JA pilots as an input to JAWG.<sup>6</sup>

Subsequent to the Malaysian Federal and State elections of June 2018, which led to a major change in the political leadership of both the country and the State, the JA pilot in Sabah underwent a temporary hiatus as the new State government reappraised its priorities and policies. It was thus not until 2019 that the new Sabah State government announced its intention to pursue the target of Jurisdictional Certification but through a step-wise approach that would first require compliance with the Malaysian Sustainable Palm Oil (MSPO) standard by the end of 2019 and then compliance with the RSPO standard thereafter.<sup>7</sup>

JCSD has now recognised that implementation of the jurisdictional approach across the whole of the State is very ambitious and instead the proposal being mooted is to start the implementation in priority landscapes. Work on smallholders and land tenure is being prioritised in Telupid, Tongod, Beluran and Kinabatangan, while integration of production with conservation and land use planning is being trialled in WWF-Sabah's Living Landscapes programme.<sup>8</sup> Under this latter programme, which is being funded by Unilever and HSBC, the JA will be implemented in Sugut, Tabin (Laha Datu) and Tawau landscapes, the boundaries of which have been redrawn to coincide with local administrative boundaries.



## Recognition of Customary Rights

The RSPO standard requires the recognition of customary rights in line with international human rights laws, which often go beyond the requirements of the statutory laws of many States. The Malaysian National Interpretation of 2015 likewise has a relatively broad interpretation of customary rights. Although public statements by Ministers imply that MSPO will recognise customary rights,<sup>9</sup> interviewees seem to think that MSPO only requires recognition of Native Customary Rights where they are already registered or titled.

In contrast with international law and the RSPO standard, Sabah's Land Ordinance - a colonial-era law which has not been substantially amended since the 1930s – considers all Native Customary Land to be State Land and while it provides for the titling of customary lands using the Torrens system, prioritises the titling of individual home lots and permanent farms, in order to free up wider areas for plantation development.<sup>10</sup> In effect, the Lands and Surveys Department does not recognise or title indigenous peoples' collective rights to their territories as recognised in international law. There is also a backlog of allegedly tens of thousands of applications for individual customary land registration.<sup>11</sup> In 2000, a law was passed allowing for the recognition of communal title but in practice, implementation of this law has imposed 'joint ventures' with plantation companies on indigenous peoples' lands without adequate participation or free, prior and informed consent. These Agropolitan schemes have been plagued with controversy.

A detailed national inquiry carried out by the Malaysian Human Rights Commission and published in 2013 concluded that there was a need for new laws to strengthen the recognition of indigenous peoples' rights in Sabah (as well as in Sarawak and Peninsular Malaysia). With specific reference to Sabah, the report of the National Inquiry recommends the need to (inter alia):

- Resolve land disputes with plantations;
- Recognise indigenous peoples' territorial rights;
- Restitute customary lands taken without recognition of rights or extinguished by gazettment;
- Create an Indigenous Land Tribunal;
- Establish an Ombudsman;
- Set up a Native Title Court to speed up the settlement of land disputes;
- Strengthen the capacity of the administration and Lands & Surveys Department; and
- Legally require FPIC, including through an FPIC law.<sup>12</sup>

Likewise, the national indigenous peoples' network of Malaysia, JOAS, has long been urging the Sabah Government (as well as the Government of Sarawak and the federal Government)<sup>13</sup> to adopt laws that recognise indigenous peoples' rights in line with the UN Declaration on the Rights of Indigenous Peoples.

During this short trip I was told by indigenous spokespersons that a large proportion of existing plantations were established on indigenous peoples' lands without prior recognition of their rights and I learned of specific cases in Tongod where new palm oil plantations allegedly continue to be established without the prior recognition of Sungai and Dusun indigenous peoples' lands.

The cases in the Sessions Court also show how the government, in this case Sabah Parks, does not recognise the customary rights of indigenous peoples, even though the community in question, Lasau Minunsud, was living in and making their livelihoods from these lands before the Mount Kinabalu National Park was gazetted over their lands, without consultation.

### Conclusion and recommendation

The current documents that I have been able to access do not make clear how the Sabah JA will recognise the full extent of indigenous peoples' land rights and this needs to be addressed with urgency.

One JA team has focused its efforts on understanding the challenges of titling the lands of smallholders and indigenous land-owners who already, or are seeking to, grow oil palms on their lands.<sup>14</sup> A very detailed study in four districts shows that only 36% of smallholders have land titles and confirms that the Lands and Survey Department is overwhelmed by the scale of applications for land title. Up to 22% of smallholdings surveyed are in Forest Reserves.

A new report on a 'Facilitated Land Acquisition Process' is not yet available to the public as it must first be considered and approved by the JCSC. It is thus not yet clear how the JA will address indigenous peoples' territorial rights.

### Self-Representation

Consistent with norms of international law on indigenous peoples and workers, the RSPO standard requires that communities be allowed to represent themselves through their own self-chosen representatives.

In Sabah, in parallel with the Native Court system, where traditional authorities are respected,<sup>15</sup> there has been an administrative tradition of appointing village officials rather than allowing communities to choose how they will be represented.

The current draft FPIC Guide of Sabah<sup>16</sup> only mentions but does not explain how self-representation will be achieved in the Sabah context. This is currently being developed in detailed SOPs that will accompany the next version of the FPIC Guide.

### Recommendation

The next version of the FPIC Guide and SOPs should include clear requirements, in line with the RSPO P&C, that clarify how self-representation will be achieved in the Sabah context, with clear language encouraging inclusive processes – women, youth and elders.

## Free, Prior and Informed Consent

The Sabah FPIC Guide (draft 2.2) has been carefully thought through to coincide as closely as possible with the RSPO P&C (2013) and takes into account (and refers extensively to) the RSPO FPIC Guide. My interviews and the smallholder survey<sup>17</sup> confirm that FPIC is considered essential or highly relevant by many indigenous peoples' organisations and smallholders in Sabah.

Overall, the Guide is excellent but there is a confusion in the Sabah Guide about the role of the agency given the responsibility to see that FPIC is carried out. The current text speaks of a 'focal agency' that will 'negotiate' with the communities on behalf of the applicant (i.e. the prospective land developer). However, since it is the developer not the agency which must implement the terms of any agreement with the community it is unclear how the focal agency has the authority to make terms with the community. Who would sign any agreement with the community on behalf of the developer? If this is not the developer, how would implementation of the agreement by the developer be made obligatory?

### Recommendation

The relationship between community, focal agency and developer needs to be clarified in the next version of the Guide.

FPIC is not currently required by law in Sabah although it is mentioned in several State policies and the Sabah Biodiversity (Amendment) Enactment 2017. The Sabah FPIC Guide 2.2 says that FPIC will be 'mandatory' but it remains unclear how this will be enforceable on non-RSPO members. Further discussions on how to make FPIC mandatory in Sabah are being explored with the JCSC and relevant government agencies, including the Ministry of Law and Native Affairs.

### Recommendation

The question of how to make legally enforceable any RSPO requirements including FPIC, that go beyond the requirements of statutory law, needs to be addressed.

The Sabah FPIC Guide 2.2 gives due emphasis on the need for 3rd party verification of any FPIC agreements. How this will be done remains unclear and relates to the wider discussion about how compliance is to be verified more generally for jurisdictional certification. As noted in New Foresight's Benchmark study, the procedure for verification has yet to be decided on. It will be vital that any verification procedure engages qualified personnel who understand the FPIC requirements.

The FPIC team had planned to carry out field trials of the applicability of the draft Guide. These have been delayed but are still planned. Indigenous interviewees emphasise that the FPIC process must be based on adequate participatory mapping of indigenous peoples' lands so these are taken into account in land use planning and in negotiating deals between communities and developers.

The Sabah FPIC Guide is designed to be applicable to new plantings except in cases of smallholders benefitting from agrarian reforms. This leaves unaddressed the question of how the JA will deal with RSPO P&C 4.4 which applies to existing plantings. The RSPO P&C 4.6, 4.7 and 4.8 require remediation where there are still disputes over any lands already taken into plantations without FPIC or recognition of customary rights. A compensation and remediation working group is proposed under the JCSC it has yet to start work. However, the task of this WG is framed in terms of compliance with the RSPO Remediation and Compensation Procedure which applies to lands developed since 2005 without an HCV assessment. However, as noted, 4.4, 4.6, 4.7 and 4.8 have a wider application.

### Recommendation

The challenge of remediation for lands taken without consent and where there are still disputes needs to be addressed.

## *Community livelihoods in HCV-HCS Land Use Planning*

An indicative map of HCVs 1-4 is being developed by the Forest Research Centre, assisted by UMS and FS. This map and an explanatory report are due to be circulated for public consultation and will include details of the methodology used to develop the map(s). The team have checked their technique against the procedure for such 'screening maps' developed by HCVRN. These maps are principally of value to show clearly where oil palm should NOT be planted but do not imply that other areas do not also have HCVs, which would be identified by more fine-grained analysis.

The team have also identified the locations of existing communities which usefully shows where there will be a need for further ground truthing to ascertain where there are HCVs 4, 5 and 6 of importance to local communities.

A methodology for developing these more detailed HCV assessments and maps has yet to be decided on. This is needed not only to identify HCVs 4, 5 and 6 of importance to local communities but also to check the validity of the coarse-grained indicative maps.

The Sabah Government contracted Carnegie Airborne Observatory, with additional funds from WWF and RSPO, to carry out a detailed Lidar survey of the whole State to determine the location of High Carbon Stock forests. This study was completed in 2017. There is an ongoing discussion about whether this information has been adequately incorporated into the Indicative HCV map.

The MSPO standard does not include the HCSA and does not have the same proscription as RSPO on any deforestation. There is a concern that any palm oil development in forests that goes ahead with MSPO certification could then disqualify Sabah from RSPO Jurisdictional Certification.

### **Recommendation**

A priority task for the HCV team is now to develop a workable methodology for how these fine-grained HCV assessments will be carried out in areas where further palm oil development is contemplated.

### **Recommendation**

The Sabah FPIC Guide should also be developed to explain how communities will participate in fine-grained HCV assessments and how they will provide (or withhold) FPIC for resulting integrated conservation land use plans for palm, livelihoods and protection.

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# Endnotes

1. Marcus Colchester spent a week in Sabah (30 September – 4th October 2019) to learn more about the progress being made towards the State of Sabah's commitment to produce 100% certified sustainable palm oil by 2025 in conformity with RSPO standards. A repeat visit was carried out in late January 2020, which included a half-day workshop with Sabah's Jurisdictional Certification Steering Committee. This work was funded by Forest Peoples Programme's core funds and complements parallel NICFI-funded reviews being undertaken by FPP of the JA Pilots in Seruyan in Central Kalimantan and the Amazon area of Ecuador. A more detailed report bringing together all the findings is planned for later in 2020.
  - The investigation in Sabah was focused on understanding how the jurisdictional approach in Sabah plans to:
  - Recognise customary land rights;
  - Ensure self-representation by indigenous peoples and local communities;
  - Respect the right to Free, Prior and Informed Consent (FPIC) and;
  - Accommodate community values, livelihoods, food security and viewpoints in High Conservation Value / High Carbon Stock land use planning.

Representatives of the following organisations were met with or interviewed during the course of the week: HUTAN, SEPA, PACOS, Forever Sabah, WWF-Malaysia, JOAS, SEARRP, Sabah Forestry Department and Grassroots. I also attended a Sessions Court hearing of two criminal prosecutions brought by Sabah Parks against members of the Kadasandusun community of Lasau Minunsud and I was able to meet briefly with community representatives and their defence counsel. Not all those who provided insights wanted to be on the record, so this report makes no attributions except when referring to publicly available documents, but I take this opportunity to thank all those who took the time to meet with, or be interviewed by, me.
2. [marcus@forestpeoples.org](mailto:marcus@forestpeoples.org) Senior Policy Advisor, Forest Peoples Programme.
3. Forever Sabah 2019a and see also Payne 2016
4. Forever Sabah 2019a, 2019b
5. Payne 2016; Forever Sabah 2019a
6. JCSD consultation draft 2019 and revised consultation draft 2020
7. New Foresight 2019
8. This stepwise approach makes sense, as long as achieving compliance with MSPO does not then create an obstacle for achieving RSPO. A comparative review of the MSPO and RSPO standards should be a priority.
9. WWF-Sabah 2019
10. <https://www.theedgemarkets.com/article/mspo-recognises-land-use-rights-and-ncr-%E2%80%944-minister>
11. Doolittle 2005
12. Colchester, Jalong and Alaza 2013
13. Suhakam 2013
14. Under the Ninth Schedule of the Federal Constitution, Sarawak and Sabah while parts of the Federation have direct authority over lands and thus administer lands according to their own separate bodies of law.
15. Wilson et al 2018
16. Peter R. Phelan, 2003, The Traditional Legal System of Sabah, Yayasan Sabah, Kota Kinabalu.
17. Agama and Murphy 2018. FPIC Guide for Sabah 2.2. A new version of the FPIC Guide with SOPs is in preparation but is not yet available to the public because of further clarification required on key aspects such as which government agency will 'host' FPIC. This is actively under development at the time of the review.
18. Wilson et al. 2018

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