

BREAKING THE HEART OF BORNEO



A Plan to Plunder Borneo's Final Frontier



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Cover photo: Inei Yeq, Spiritual leader of the Dayak Bahau Busaang of community of Long Isun



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CONTENTS

Executive summary.....	04
Indigenous Peoples of Borneo.....	11
01 The Heart of Borneo.....	13
02 Collaborative Conservation.....	15
03 The ‘Green Economy’.....	17
04 A brief modern history of Borneo’s borderlands.....	19
05 A brief history of Indonesian laws that discriminate against indigenous peoples.....	21
06 Green Gold: Borneo’s oil palm takeover.....	27
07 The Malaysian company coup.....	29
08 Investing in Destruction.....	31
09 The conflict commodity.....	33
10 Rhetoric and rule-bending.....	35
11 The Palm Oil Mega Project.....	39
12 Jokowi’s false promises.....	41
13 Trans-Kalimantan/Pan-Borneo Highway project.....	43
14 China’s Belt and Road Initiative.....	47
15 West Borneo Economic Corridor.....	49
16 The Integrated Border Development Program.....	51
17 Final lessons from the frontier.....	53
18 Recommendations.....	55
Annex 1: A Chronology of legislation in Indonesia that erode Indigenous Peoples’ rights.....	61
Endnotes.....	64

EXECUTIVE SUMMARY

OVERALL FINDINGS

“The companies believe that there is no community in the area. There has never been any form of socialisation. Instead, we have a palm oil army who patrol their plantation. They don’t want villagers around their company operations even though this is our land.” Village Representative, Bebenas Hamlet, Nunukan District

In Indonesia, the expanse of oil palm has been astronomical. The monocrop plantations have swollen from 3.6 million hectares (ha) in 2008, to 11.5 million in 2015¹ before reaching 16.8 million in 2019,² with a further estimated 5.5 million ha of land in as yet undeveloped concessions.³ In total, oil palm concessions now cover more than ten per cent of the land area of Indonesia, this is more than twice the island of Java, or more than five times the land area of the Netherlands.⁴ Borneo’s borderlands are one of the epicentres of this expansion. Home to thousands of indigenous communities, the proliferation of the commodity has had dire consequences for the Dayak and other indigenous groups whose rights have been routinely ignored and violated as the monoculture eats up their ancestral territories.

Since 2005, there has been a concerted effort to promote the crop along the rich biodiverse frontier that divides Borneo between Indonesia and Malaysia. Despite the Indonesian government paying lipservice to critics who warn of the existential threat this poses to the island’s indigenous peoples, the last decade has seen an alarming increase in land conflicts in the border region. The Consortium for Agrarian Reform, Indonesia’s largest agrarian movement organisation, reported 2,047 conflicts during President Joko Widodo’s (Jokowi) first term (2015-2019) – an increase of 56% over previous President Yudhoyono’s second term (2010 to 2014).

The violation of land rights by plantation companies remains the most common cause of such conflicts. Today in Indonesia 1% of the population controls 59% of agrarian resources and land. Less than one per cent of the country’s indigenous communities have received national recognition of even small parts of their traditional lands - covering a meagre 35,202 hectares of customary forests according to official data. A mere handful of these are in the Kalimantan border region.



The companies believe that there is no community in the area. There has never been any form of socialisation. Instead, we have a palm oil army who patrol their plantation. They don’t want villagers around their company operations even though this is our land.”

Village Representative, Bebenas Hamlet, Nunukan District

Kule Liah, Long Isun elder

Despite President Jokowi's promises to recognise indigenous peoples land rights, his focus has instead been taken up by promoting mega-infrastructure projects across the archipelago. The Trans-Kalimantan Road Network project - which includes the upgrading and construction of 16 routes extending over 5,316 kilometres across the island - is a case example. Before the lands of indigenous peoples' along the borderlands have been recognised and secured, their previously inaccessible territories have been opened up to coal mining, oil palm plantations and industrial logging, leaving local communities vulnerable to exploitation and appropriation.

This has catalysed into a perfect storm, undermining the rights of indigenous peoples to own their lands and enjoy their cultures. The combination of the Trans-Kalimantan Road Network and private investments (financed by big banks and international financiers) threatens the devastate Borneo's last remaining tropical forest but millions of indigenous people who depend on these forests for their very survival.

Although big conservation organisations have attempted to reign in this threat through the Heart of Borneo conservation initiative, in reality, they have been more complicit than constructive in the plight facing indigenous peoples' in the heart of Borneo. Now, more than ever, these shortfalls need to be addressed whereby the Dayak and other indigenous peoples are recognised as the rightful owners and guardians of the forest - rather than the extractive companies who profit from its' plunder.

As the Chinese Belt and Road Initiative seeks to finance the island's expansive road network, it is paramount that international financiers, such as the newly formed Asian Infrastructure Investment Bank, revise their policies in order to give indigenous peoples the right to give or withhold consent to activities taking place on their lands. Similarly, moves by the Asian Development Bank to promote the West Borneo Economic Corridor which has the explicit aim of "extracting raw materials" through "large companies with vested interests", should guarantee that the rights of indigenous groups on both sides of the frontier are secured prior to the corridor's realisation.

It is for this reason that the signatories of this paper call for the immediate suspension of the expansion of oil palm and logging operations in the border region until such time as indigenous peoples' possession and ownership rights over their customary territories are secured, and their free, prior and informed consent to development planning is obtained. If community rights are not respected, Borneo will be transformed from the 'lungs of the world', to the 'broken heart' of a sick planet.

WHY THIS RESEARCH?

In 2019, Borneo hit international headlines as it positioned itself to become the new ‘development hub’ of South-East Asia. Home to millions of indigenous peoples, these proposals pose an existential threat to the island’s indigenous population, whom have yet to have had their rights effectively guaranteed.

Despite his promise in 2014, repeated in 2019, to recognise indigenous peoples’ rights and transfer millions of hectares of forests to local communities, the Widodo administration has met less than ten per cent of its target and instead has been accelerated the exploitation of indigenous lands. Nowhere is this more visible than along the Indonesia-Malaysia border, where the renewed focus on infrastructure expansion and the allure of the interior’s natural resources has contributed to hundreds of thousands of indigenous people being displaced.

To lay bare the reasons for the vast encroachment and takings of indigenous peoples’ lands for road-building, and extractive industries along the borderlands, this paper compiles evidence from the ground which highlights ongoing serious human rights violations, brought about by the massive and non-consensual taking and conversion of indigenous peoples’ ancestral lands and forests to oil palm plantation, logging and mining concessions, and associated roads.

WHY WE NEED TO ACT NOW?

“We want our land back”

Duek anak Atin, spokesperson for Bidayuh Dayak of Gumbang Asal Bau

There has been no effective changes in Indonesian law or practice since 2007 when the UN Committee on the Eradication of Racial Discrimination recommended action to address serious human rights concerns in the Palm Oil Mega Project. A project which was smaller in scope than Indonesia’s current actions and plans along the Kalimantan border.

Now in 2020, in the midst of the COVID-19 pandemic, the Widodo administration aims to “capitalise on the crisis...to make a big leap”⁵ by again promoting further expansion of the oil palm industry. This is extremely alarming when one considers the mass deregulation bill passed in August 2020 and the millions of hectares in undeveloped concessions which threaten Borneo’s borderlands.

To avoid irreparable harm to the island’s indigenous peoples and the displacement of thousands of communities, the rights of indigenous peoples must be safeguarded and secured **before** oil palm or logging concessions in the border region are realised, and associated infrastructure constructed.



Samuel Nipaq surveys his community’s customary forest

REPORT OUTLINE

“Dayaks can’t be separated from the forest, our lives are spent in the forest. Without her we lose our identity”.

Inei Yeq, Spiritual leader of Long Isun

The paper is broken down into a number of sections, first exploring the establishment of the Heart of Borneo Conservation initiative (HoB) – a transnational conservation initiative covering 23.4 million ha across the countries of Malaysia, Indonesia and Brunei – which came about, in part, in response to an Indonesian Ministry of Agriculture plan in 2005 to form a 200-kilometre-wide plantation corridor spanning the entire length of the border with Malaysia. The goal to create the world’s largest oil palm plantation – 1.8 million hectares (ha) – in a 5-10-kilometre belt along the frontier triggered international and national outcry. The HoB, thus, was born to curb the unbridled exploitation of the borderlands.

Despite its noble aims of protecting the last remnant of Borneo’s primary rainforest, reports from communities on the ground indicate that the aggressive promotion of large-scale plantations by the governments of Indonesia and Malaysia remain undeterred by the much-publicised conservation initiative. This evidence is supported by the alarming rates of deforestation within the HoB - which WWF reported to be at 2.19% between 2007 and 2012. By 2014, approximately 10% of the total area of HoB – some two million hectares of forest - had been lost, with hundreds of thousands of indigenous people at risk of being displaced.

The paper goes on to detail which initiatives within the HoB have been successful, most notably the case study of Kayan Mentarang National Park. The effectiveness of the park has been largely due to the ability of indigenous groups to participate in the park’s protection. Unfortunately, this is an anomaly. We have found that the HoB, instead of promoting the recognition of the role of indigenous peoples in forest management, has pivoted the project towards exploitative, extractive industries at the expense of the local communities they initially set out to serve.

For the big conservation organisations involved, the HoB has proved to be very lucrative, promoting ‘sustainable’ commodities provides an important revenue stream for organisations such as World Wide Fund for Nature (WWF), The Nature Conservancy (TNC) and Rainforest Alliance. Our findings on the ground, however, indicate that certified companies are frequently in violation of indigenous rights all the while supplying the market with ‘green’ products.

Similarly, the project, has acted as a useful tool for the governments of Indonesia and Malaysia to appear to be taking a firm stance on deforestation and defending human rights, all the while paradoxically re-branding and re-packaging the widely criticised ‘Palm Oil Mega Project’ (POMP) which in 2006 promoted the world’s largest oil palm estate at the expense of Borneo’s indigenous peoples. It is at this point; the report explores the history of the exploitation of the borderlands since the Suharto era and offers a brief history of Indonesian laws that discriminate against indigenous peoples.

The focus then turns to the experience of the past decade in Borneo, explored through the lens of the expanse of the oil palm industry and Indonesia’s ‘Grand Design’ – a 15-year master plan for economic development, defence and security along the country’s borders. Both of which provide compelling evidence that the ‘frontier’ mentality that first drove the aggressive pursuit of timber exploitation at the expense of customary rights has been transferred to large-scale plantations which now dominate the border landscape.

Ibu Tipung engaged in a community meeting



In 2014, for example, large-scale plantation development was explicitly highlighted by the government as the main economic driver for the country's borders.

The monocrop expansion was to be facilitated through huge investments in infrastructure, carried out in cooperation with the private sector and the military. In 2016, the government introduced a new 'Integrated Border Area Development Program', which prioritised the Kalimantan borders as a priority area for investment. This built on plans to establish an economic corridor – the West Borneo Economic Corridor - along the frontier, promoted by the Asian Development Bank.

The report highlights that in recent years, these perils have become all the more real for the indigenous population as the Trans-Kalimantan road network carves its way into previously inaccessible indigenous ancestral territories. The expansive mega-infrastructure project plans to join up with the neighbouring Pan-Borneo Highway on the other side of the international border as the island is prepared to be sliced and diced in an effort to secure easy access to the rich natural resources that lie within the interior.

The paper concludes by looking at the threat posed by both the Chinese Belt and Road initiative and the Asian Development Bank – which is bankrolling part of the new infrastructure and promoting a Special Border Economic Zone on the island of Borneo. Simultaneously, reports from indigenous communities across the borderlands identify a worrying acceleration and proliferation of concessions. All this is occurring without the effective participation of indigenous groups who risk losing everything to satisfy the Widodo administration's ambitions to 'pave' an oil palm belt across the island's interior.

From the case studies presented, we have found that despite rhetorical pledges to recognise indigenous peoples' rights and transfer millions of hectares of forests to indigenous peoples and local communities, in practice, Jokowi has continued an all too familiar pattern of eroding indigenous customary rights. Today across the borderlands, over one million indigenous Dayak people directly depend on the forests for their livelihoods. It is time States and institutions recognised their critical role in maintaining the forests, preserving the rich and extraordinary biodiversity through their traditional conservation practices, and guarantee, respect and protect indigenous peoples' rights.

CONCLUSIONS AND NEXT STEPS

A number of recommendations are made to the various actors operating in Borneo's borderlands, these include (but are not limited to):

- **Conservation agencies, donors and other actors operating within the HoB** should employ a rights-based approach to conservation and call on the governments of Indonesia and Malaysia to protect and recognise the rights of indigenous peoples and local communities customary within their jurisdictions.
- **The governments of Indonesia and Malaysia** should immediately suspend the expansion of oil palm and logging operations in the border region, together with associated infrastructure development, until such time as they have recognised and secured indigenous peoples' possession and ownership rights over the lands encompassed by their customary tenure systems and obtained their free, prior and informed consent to proposed developments.
- **Certification bodies** working within the HoB should provide independent and transparent audit processes to break the 'clientelist' links between auditors and the companies they audit as well as create a bond mechanism to hold certified companies accountable for any environmental and socio-cultural damages they cause affecting indigenous peoples and their traditional territories, even when these companies cease to be certified.
- **Infrastructure mega-projects** should ensure that all relevant public and private actors involved in the project carry out human right due diligence, guaranteeing that indigenous peoples and local communities have a right to give or withhold their free, prior and informed consent for any proposed projects.
- **Banks and Extractive industries** involved in the financing and exploitation of natural resources on the island of Borneo should ensure full compliance with laws, regulations, and with Free, Prior and Informed Consent (FPIC) processes for all areas under their management fund or control, as well as enact zero tolerance procedures within their supply chains, investments and/or financing portfolios to prevent violence, criminalization, intimidation, and killing of human rights, land, and environmental defenders.
- **International Development Financial Institutions** should integrate a requirement to respect international human rights and environmental law in their safeguards and sustainability policies, including the right of indigenous peoples to give or withhold their free prior and informed consent to proposed projects.



Dayak Bahau Busaang women celebrate their annual Hudoq (rice harvest) festival

INDIGENOUS PEOPLES OF BORNEO

The indigenous peoples inhabiting Borneo's borderlands are commonly known as 'Dayak' – which literally means 'the upstream peoples'⁶. The term was originally adopted by Europeans to refer to the 'non-Malay' inhabitants of the island. Dayaks have inhabited the island for at least the past 4,000 years⁷. Anthropologists calculate that there are some 450 ethno-linguistic Dayak groups living on the island of Borneo.^{8,9}

Malaysian Borneo comprises of the Federated States of Sabah and Sarawak. There are 39 indigenous groups in Sabah of which the Kadazan-Dusun, Bajau and the Murut are the largest (these are broad categories and actually include multiple sub-groups). Together all the indigenous peoples account for almost 60% of the population of Sabah. In neighbouring Sarawak, where officially there are some 40 ethnic groups, indigenous Dayaks – Iban, Bidayuh, Melanau and 'Orang Ulu' amongst others – account for over 50% of the population. It should be noted, some rural ethnic Malay peoples satisfy a description of the term indigenous peoples in the broader sense as many groups still self-identify, allocate, transfer and inherit lands through the application of customary law.

Indonesian Borneo (Kalimantan) is divided into five provinces, three of which occupy the frontier borderlands – namely, West, East and North Kalimantan. In West Kalimantan, 42% of the population identify as Dayak or with one of the 151 sub-groups and languages across the province. In East Kalimantan by contrast, Dayak peoples are a minority accounting for only 10% of the total population, in part, due to Indonesia's 'Transmigration Scheme' whereby 'surplus people' predominantly from Java and Madura (and later Bali, Lombok and Flores) were resettled on 'underpopulated' Kalimantan to spur land development and provide a labour force for expanding plantations. The families of these economic migrants now account for over 62% of the population of East Kalimantan. In contrast, North Kalimantan has been far less affected by transmigration and remains the least populous province in Indonesia. The population is composed of a diverse mix of ethnic groups, dominated by the indigenous Lundayeh, Kenyah, Punan and Tidung¹⁰. New investment opportunities, however, are attracting significant numbers of Bugis, Makassarese and Javanese migrants, and the population density is expected to increase significantly in coming years due to increased connectivity across the island and the frontier.¹¹



Samuel Nipaq sifts through his fishing net for a catch

01 THE HEART OF BORNEO

A treasure trove of biodiversity, Borneo, the world's third largest island, boasts over 3,000 species of trees, 2,000 species of orchids, and 1,000 species of ferns – of which over a third are unique to the island. The unique mix of lowland Dipterocarp forests, mangroves, peat swamps, freshwater swamp forests and ironwood forests are home to some 15,000 different flowering plants¹³. These surprising and diverse ecosystems house numerous endemic mammals, including thirteen primate species ranging from the iconic Orangutan to the Bornean white-bearded gibbon. The skies are filled with over 350 bird species, of which thirty-seven are endemic to the island – the hornbill being of particular symbolic importance. Below, roam numerous carnivores and omnivores from the clouded leopard to the sun bear.

Each scientific expedition produces new discoveries of species and sub-species (this is particularly true of Borneo's fresh-water fish and amphibians) which only cements the island's global importance as one of the epicentres of life on our planet. For millennia, this biological richness has been safeguarded under the careful stewardship of the island's forest-dwelling Dayak peoples, as the indigenous inhabitants of Borneo are now commonly known.

“Today across the borderlands, over one million indigenous Dayak people directly depend on these valuable forests for their livelihoods and continue to play a critical role in maintaining the forests, preserving the rich and extraordinary biodiversity through their traditional conservation practices.”¹⁴



Today across the borderlands, over one million indigenous Dayak people directly depend on these valuable forests for their livelihoods and continue to play a critical role in maintaining the forests, preserving the rich and extraordinary biodiversity through their traditional conservation practices.”

The international conservation community, aware of the wealth of biodiversity, launched the Heart of Borneo initiative (HoB), a regionally-integrated conservation scheme to protect the island's last remaining rainforests and water catchments in the mountainous interior. Spearheaded by the World Wide Fund for Nature (WWF), Conservation International, Wildlife Conservation Society and The Nature Conservancy (TNC), it was agreed that the concept for a transboundary conservation area should be promoted, with WWF taking the lead. In 2007, the HoB formalised cooperation between Malaysian Borneo (Sabah and Sarawak states), Indonesian Borneo (four provinces of Kalimantan), and Brunei to integrate and enhance a 23-million hectare trans-boundary network of protected areas, production forests, and other sustainable forest uses for mutual conservation benefit. The island's borderlands sit in the geographical centre of this ambitious project.

The complications created by involving multiple actors at various levels of the political landscape – each with their own self-interest and vision for the future – all simultaneously negotiating differing interpretations of the HoB's function within overlapping jurisdictions, has raised scepticism amongst its critics.¹⁵ Especially when one considers, the huge trade-off between the size of the conservation area and the capacity to manage it. One notable exception is Kayan Mentarang National Park which has attempted to champion the traditional management practices of the Dayak communities.



Huwat Biseh, Long Isun hunter and head of the community's forest monitoring team

02 COLLABORATIVE CONSERVATION

Since the 1980s, progress has been slow to recognise that environmental resource management is inseparable from the welfare and human rights of indigenous peoples.¹⁶ Traditionally, conservation initiatives have failed to focus on collaboration, inclusion and participation of communities in the management of natural resources and protected areas. A concern that continues to this day. In 2018, the UN Special Rapporteur on the Rights of Indigenous Peoples noted that conservation continues to “ignore the growing body of evidence that forests thrive when indigenous peoples remain on their customary lands and have legally recognised rights to manage and protect them”.¹⁷

The Heart of Borneo aimed to amend this oversight and recognise the existing conservation value of indigenous peoples land. Fundamental to this approach would be the recognition of indigenous peoples’ internationally guaranteed rights, including customary rights, and the amplification of the need for security of tenure. In response, the world’s largest conservation organisation – WWF – advocated for collaboration between rightsholders (indigenous peoples and local communities) and other stakeholders – government and NGOs – in the management of protected area.

Kayan Mentarang National Park, in which WWF has played a central role, is rightly heralded as an example where this type of collaborative park management works. The park is geographically and symbolically located in the heart of Borneo, on the border with Sarawak to the west and Sabah to the north. Covering

50% of Malinau District, North Kalimantan, in Indonesia, it is the largest protected area on the island – extending over 1.38 million ha of pristine rainforest – and one of the most formidable in Southeast Asia.

“The natural history of Kayan Mentarang National Park is inexorably intertwined with the history of the 27,000 indigenous Dayaks, who belong to 11 customary land areas and live inside or in close proximity to the conservation area.”¹⁹

In 2002, it became the first conservation area in Indonesia to be granted collaborative management status by the Ministry of Forestry. Under this model, responsibilities for conservation are devolved to local institutions and leaders, and traditional knowledge is integrated into forest management²⁰, while activities in the field are designed to document and legitimise the customary rights of local communities to continue to use and manage forest resources in the conservation area²¹. Once local capacities are developed and customary rights are protected, participation then becomes real.

Indigenous communities were able to advocate for their right to manage the national park through the Alliance of the Indigenous People of Kayan Mentarang National Park (FoMMA)²², an inter-adat institutional coordination body of elected members of different customary councils. Under this arrangement, the central, regional and local governments act only as facilitators, advisers and providers of guidelines, or at best as participants in co-management.



The natural history of Kayan Mentarang National Park is inexorably intertwined with the history of the 27,000 indigenous Dayaks, who belong to 11 customary land areas and live inside or in close proximity to the conservation area.”

This model, one of shared governance, co-decision making, and long-term sustainable livelihoods ensures indigenous support and effective participation in the park management.

Within Kayan Mentarang National Park, for example, lie the Krayan highlands. The highlands are the ancestral homelands of the Dayak Lundayeh, Lun Bawang, Kelabit and Sa'Ban indigenous peoples. While administratively divided between Malaysia and Indonesia, communities have actively taken steps to deter destructive development represented by the spread of oil palm plantations which threaten local food security and traditional farming practices.²³

In 2004, the Alliance of Indigenous Peoples of the Highlands (FORMADAT)²⁴ was established. With the support of local government, the alliance is working with local farmers to promote *adan rice* – a crop that has been traditionally cultivated in the area for generations – through a network of farming cooperatives. In 2016, the communities self-declared the Krayan Highlands an area for organic and traditional agriculture – their ‘territory of life’ – and began advocating for formal legal recognition by the regional and national government²⁵.

Alongside this initiative, FoMMA, has spearheaded collective action for the recognition of land rights of indigenous communities in the 11 customary territories within the National Park.

In recent years, however, WWF and the HoB have been guilty of pivoting their project towards exploitative, extractive industries at the expense of the environment and indigenous communities whom they initially set out to serve.

Unfortunately Kayan Mentarang National Park is a legislative anomaly within the HoB. Although WWF, on paper, has recognised that old conservation models for protected areas have fallen short in terms of community involvement and support²⁶ - largely as a result of a fatal combination of tenure insecurity and alienation through the imposition of external regulations – in practice, indigenous peoples continue to play a passive role within the transnational conservation initiative. Support for the ‘concession model’ continues to champion recognition of indigenous rights.

03 THE 'GREEN ECONOMY'

In 2010, the three HoB governments announced they would finance the initiative through the creation of the 'Green Economy'. Under this model, the forest would be protected through "reduced impact logging and international certification of sustainable forest management". At the same time, "plantation development [would] only take place in degraded areas"²⁷, overlooking the fact that land is commonly degraded by timber production – a precursor for forest conversion to oil palm monoculture as timber revenues help offset the costs of establishing large-scale plantations²⁸.

This alternative conservation strategy regards commodity certification schemes – such as FSC and RSPO that seek to apply international sustainability standards - to be more effective tools for conservation than declaring new protected areas or recognising indigenous peoples' customary territories. This has resulted in the area of forest supported for certification in Kalimantan to explode from 1.4 million hectares in 2010 to 3.9 million hectares in 2016.²⁹ These changes have been substantially driven by WWF's non-profit arm – The Borneo Initiative (TBI) - which 'supports the concession model'.³⁰

This is lucrative business for TBI which supports companies wishing to improve their 'green' image. TBI has raised over US\$10 million since the inception of HoB where "forest enterprises themselves are co-investors in the forest certification program". This is not seen as a potential conflict of interest, instead some money feeds back to the WWF, which provides "field assistance so that new members can implement their action plans for FSC certification". Companies in return "achieve double certification – SVLK³¹ plus FSC – and gain extra goodwill in the market place as responsible forest stewards".³²

Between 2000 and 2018, 50% of the island's lowland forest has disappeared and 14% of Borneo's old growth forest has suffered similar setbacks.³³ The rates of deforestation in HoB between 2007 and 2012 was 2.2%, this meant that by 2014 approximately 10% of the total area of HoB – some two million hectares of forest – had been lost.³⁴

In effect, these policies irrationally privilege timber companies to act as better stewards of the forest than the indigenous peoples. But has it worked? The statistics and local narratives tell otherwise. WWF spokesperson themselves admit "the primary pressure [on the HoB] is the legal conversion of logging concessions".³⁵

In 2016, WWF stated "a new focus is needed because, if action is not taken...a further 6 million ha of forest may be deforested over the next five years" noting "the expansion of oil palm plantations is a major factor in the continued deterioration of Bornean ecosystems".³⁶ The organisation did little to address their self-defined 'inconvenient truth', instead, in 2018, reiterating that only "big business has the resources to bring transformational change [within the HoB]" noting paradoxically in the following line the need to "limit the damage caused by big business".³⁷

Despite the clear failures of this approach to conservation within the HoB – which has been made explicit by the organisation's regular revision and reduction of the project's conservation goals³⁸ - there appears to be little attempt to change course. This is at a time when more than ever there is a need for clear leadership to steer the HoB project in a more sustainable and rights-compliant direction.

CASE STUDY – LONG ISUN

Today 71% of the East Kalimantan's forests are in the hands of forestry companies, some 5.9 million hectares, and this area encompasses 642 indigenous villages³⁹. An example of the threats caused by these activities comes from the newly formed district of Mahakam Ulu, located in the western part of East Kalimantan, which currently remains a remote and isolated area due to minimal infrastructure. The indigenous Dayak communities that populate the District practice small-scale shifting cultivation and depend on the gathering and selling of non-timber forest products to generate income.⁴⁰

Currently, there are twenty logging concessions peppered across Mahakam Ulu, including one that incorporates some 13,000 hectares of the ancestral lands of the Dayak Bahau Busaang indigenous community of Long Isun⁴¹. Community members in Long Isun were not made aware of this until forestry operations commenced in one area of their lands in 2014.⁴² Part of the problem was that WWF's HoB partner, The Nature Conservancy, did not carry out proper participatory mapping and community consultations with the Dayak village, thus facilitating timber companies' access to Long Isun's forests.

When community members complained about the logging, they were met with intimidation and criminalization⁴³. Village representatives were arrested and a prominent community activist was imprisoned for over three months⁴⁴. An investigation by the FSC found serious human rights violations and observed that the company had made no significant effort to address the ongoing land dispute or to remedy past abuses.⁴⁵ While various levels of government and the WWF are aware of this situation, the company continues to operate with impunity within the HoB.



Before the company came, we lived in peace. For the last ten years we have been in conflict with KBT. We don't want any company to disturb our land, the land of our ancestors."

Tipung Ping, Long Isun elder



04 A BRIEF MODERN HISTORY OF BORNEO'S BORDERLANDS

PHASE ONE: SUHARTO'S FOUNDATIONS

By the end of the Suharto era, roughly 40 million ha of Indonesia's outer island's tropical forest had been lost, and a much larger area left degraded.⁴⁶

Since 1963, there has been the gradual militarisation of Kalimantan's borderlands. In 1967, President Suharto awarded a one-million-hectare forestry concession along the border with Malaysia⁴⁷ to an Indonesian Armed Forces' foundation – Yayasan Maju Kerja (Yamaker) – citing “national security considerations”.⁴⁸ This was facilitated by the passing of the 1967 Basic Forestry Law. No prior notice was given to the indigenous communities whose traditional lands were overlapped by Yamaker's concession – establishing a pattern that would continue to the present day. For decades Yamaker grossly mismanaged indigenous lands, establishing massive timber theft and cross-border smuggling. The military's position was further consolidated in 1994 when Suharto passed the first official presidential decree on development initiatives in the border areas of Kalimantan. Headed by the Ministry of Defence and Security, Suharto's ‘development’ consisted of large-scale forest resource extraction from which local communities benefited little.

PHASE TWO: PALM OIL MEGA PROJECT

In 2005, the Minister of Agriculture publicly announced the formation of 200-kilometre-long plantation corridor to span the entire length of the border with Malaysia with the goal of creating the world's largest oil palm plantation – 1.8 million hectares (ha) – in a 5-10 kilometre belt along the frontier.

The fall of the ‘New Order’ in 1998 did not end military involvement along the resource-rich national border. A number of military owned and controlled logging concessions remained active until the early 2000s⁴⁹ and the power vacuum created by the resignation of President Suharto was filled by military entrepreneurs who teamed up with local elites, Malaysian timber barons and private companies to create a network of large-scale ‘illegal’ logging, smuggling valuable timber across the border to Malaysia. At the same time, the implementation of regional autonomy severely dented the central government's share of revenues from the border area. To regain control of the borderland's lucrative forestry sector, the ‘Palm Oil Mega Project’ was announced. The main investors would be the Chinese government and Malaysian companies, investing US\$567 million. The project was applauded by the army⁵⁰ but criticised internationally. In response to pressure from the United Nations to re-think the planned plantation, due to concerns that indigenous Dayak groups would lose access to their customary lands, the government announced it would reduce the size of the project (noting only 180,000 hectares of the border is actually suitable for the monocrop – causing some commentators to speculate whether the plan was about palm oil at all, or more about access to isolated, resource abundant areas and logging opportunities)⁵¹. However, the government stated that it still intended to move forward with an agricultural corridor along the border.



Huat Biseh drawing traditional Dayak Bahau Busaang motifs

PHASE THREE: THE ‘GRAND DESIGN’

Investments along the borderlands were to be facilitated by the Trans-Kalimantan road network. Thousands of kilometres of highways that would open up previously isolated indigenous lands to the island’s primary industries – coal mining, oil palm and industrial logging.

In 2011, the Indonesian Agency for Border Management released a new national regulation, the ‘Grand Design’, which stipulated a 15-year master plan for economic development, defence and security along the country’s borders. They were to become Indonesia’s new centres of economic growth by the year 2014, with large-scale plantation development as the main economic driver. This was to be achieved through huge investments in infrastructure, mining and agricultural expansion, carried out in cooperation with the private sector and the military⁵². In 2016, the government introduced a

new ‘Integrated Border Area Development Program’, prioritising the Malaysian border as one of three key areas, with West Kalimantan highlighted as one of the initial provinces to participate in the program. Plans for the ‘West Borneo Economic Corridor’ (WBEC), had been floating around since 2004 when the Asian Development Bank (ADB) initially scoped the viability of establishing infrastructure to build connectivity in the region. In 2017, ADB noted that the driver of the WBEC would be “foreign investments concentrated in large companies with vested investments in extracting raw material or profiting from low-cost factors of production”.⁵³

05 A BRIEF HISTORY OF INDONESIAN LAWS THAT DISCRIMINATE AGAINST INDIGENOUS PEOPLES

In most legal systems, so called customary rights are regarded as the lowest level of law and overruled by any higher form. Indonesia is no different. To avoid such a misinterpretation, the authors wish to reiterate that when we advocate for customary rights recognition, we are asserting that indigenous peoples' forms of tenure be equally protected by law, equivalent to at least the highest form of tenure recognized for State-derived tenures, and in all likelihood higher govern the interconnected rights that transcend merely property.

“The archipelago has suffered the gradual centralisation of proprietary rights over all lands and forests at the expense of indigenous peoples' forms of land tenure as defined by systems of customary rights.”

The *1870 Dutch Agrarian Land Law* was the first attempt to assert jurisdiction over all but privately owned lands, whereby all lands with no legal owner became 'domain' lands owned by the Dutch colonial state. However, the measure was contested by other Dutch colonials and never fully implemented. Indonesian independence led to a renewed effort to take over indigenous lands. The combination of the 1945 Constitution and the *1960 Basic Agrarian Law* reintroduced the concept of State 'domain' – lands were now to be entrusted to the new socialist republic, instead of the Dutch East Indies, to be developed by the newly independent State for the benefit of all Indonesians.



The archipelago has suffered the gradual centralisation of proprietary rights over all lands and forests at the expense of indigenous peoples' forms of land tenure as defined by systems of customary rights.”

When Suharto seized power in 1966, his military government immediately harnessed Indonesia's centralised State bureaucracy to the goals of free market capitalism. Both the *1967 Basic Forestry Law* and *Mining Law* radically redefined indigenous customary rights. Indonesia's forests were classified as state-owned, brushing aside indigenous communities' ownership claims, and customary rights were in effect subordinated to 'the national interest' now represented by the private sector. Another notable piece of legislation enacted during Suharto's rule was the *1979 Law on Village Administration* whereby village-level customary institutions were totally replaced by local government appointees who thus assumed the authority of traditional leaders and customary decision-making processes.

The subsequent fall of the 'New Order' regime (1966-1998) did bring reforms to the country's land laws – but, mostly, the wrong kind of reform.

The *1999 New Basic Forestry Law*, for example, mentioned 'customary forests' but defined these as lying in State Forest Areas, which are defined 'forests with no rights attached'. This law prioritised recognition of exploitation rights by concessionaires for logging and plantation schemes over indigenous peoples' land rights. This discriminatory legislation was further boosted by the *2004 Law on Plantations*, whereby responsibility to obtain agreement with landowners over the surrender of their lands was given to companies instead of local government. Unequal power relations between plantations and indigenous communities effectively legalised a process land grabbing.



Samuel Nipaq prepares a meal from produce collected from his orchard



Despite rhetorical pledges to recognise indigenous peoples' rights and transfer millions of hectares of forests to indigenous peoples and local communities, in practice, the current Widodo administration has continued this trend of eroding indigenous customary rights.”

These woes were further compounded by the *2009 Regulation on REDD Procedures* which allowed the State to create a massive system of publicly- and privately-held forestry concessions and ‘carbon sinks’ in forests traditionally owned by indigenous peoples without any regard for their prior rights and existence.

Despite rhetorical pledges to recognise indigenous peoples' rights and transfer millions of hectares of forests to indigenous peoples and local communities, in practice, the current Widodo administration has continued this trend of eroding indigenous customary rights.

The *2014 Law on Plantations* has failed to uphold communities' rights to give or withhold their free prior and informed consent (FPIC) to concessions imposed on their lands. The recognition of customary communities can now be achieved through local regulations – a time-consuming and opaque process. This process, however, has made customary rights subject to political manipulation and local government interpretations or an outright veto by local authorities.

A new ‘Omnibus Bill’ now poses the biggest threat to the country’s indigenous peoples.

The controversial Omnibus Bill proposes massive deregulation, through some 1,200 amendments to at least 80 existing laws, thereby threatening indigenous peoples' efforts to secure rights to their customary lands and participate in environmental and social impact assessments, while removing measures designed to ensure they benefit from oil palm development on their ancestral territories.

See Annex for extended list of discriminatory laws against indigenous peoples in Indonesia

LEGAL OBSTACLES TO RIGHTS RECOGNITION IN MALAYSIA

Though the Constitution of the Federation of Malaysia recognises customary law, authority over land is entrusted to the various states – the Peninsular, Sabah and Sarawak – all of which have their own laws relating to the ‘native peoples’ as they are still commonly called. Each state has laws that relate to Native Customary Rights (NCR) – a species of aboriginal title developed by Malaysian judiciary – which can be loosely defined as a body of customary rules that form a system to recognise and protect the rights of natives’ towards their lands, including (amongst others) the rules of access, rights of ownership to land and other natural resources, and resource utilisation and management.

This said, whilst NCRs operate within the community through informal rules embedded in the native’s’ customs and traditions, it has little or no function in the current legal system as these rules have never been codified into formal laws. Thus, the understatement of NCR in Malaysia’s current legal systems has made it difficult for native peoples to exercise their rights, leaving serious shortcomings to NCR in practice where the state can restrict or extinguish NCR at their will.⁵⁴

“

Malaysia is unusual in not having ratified the main treaties and conventions of the United Nations and ILO, despite being members of both, limiting the options for pressing for legal reforms to recognise indigenous territorial rights through the international treaty bodies.”

In Sabah, in accordance with the 1930 Land Ordinance (which remains in effect), native people seeking title to their NCR have to apply to the Assistant Collector of Land Revenue and, once processed, the claims are then passed to the Director of Lands and Survey for titling (or rejection). Kadazan-Dusun complain that the process is extremely onerous and expensive, a process whose capacity has been further tested by the sheer number of claims.⁵⁵ It is worth also highlighting that protected areas in Sabah do not respect NCR land. With the gazettment of national parks, the rights of communities living within the boundaries of protected areas are considered to be extinguished.⁵⁶

In Sarawak, the 1958 Land Code whilst recognising NCR, sought to formally record and limit the extent of these rights – restricting NCRs to farmlands and forest fallows – and treated NCRs as licensed use rights on state lands. Since independence in 1963, however, amendments have been passed by the state of Sarawak which further extinguish these rights.

The most contentious aspect of the 1958 Land Code was a provision that froze all extension of NCR without permit after 1 January 1958. From the government's point of view, native communities do not enjoy NCRs if their farms were not established by 1958, with rare exceptions.⁵⁷

In 1987, it was made illegal for communities to block companies having access to their logging and plantation enterprises even if these roads crossed areas claimed by natives as customary lands. In 1994, an amendment empowered the minister in charge of land matters to extinguish NCR to land. In 1996, the burden of proof with respect to NCRs was placed on the native claimant against the presumption that the land belongs to the state. In 1997, a law was passed disqualifying communities from making their own maps of their customary lands for use in courts.

In 2000, an amendment removed the phrase 'any other lawful method' from Article 5 which removed any room for NCR claims to wider areas other than cultivation, this allowed the Government to take the unregistered large areas of fallow land from the community in order to provide land for large-scale oil palm plantations.⁵⁸

In sum, there has been a progressive extinguishment of NCRs, by giving the state sole power to decide on the rates of compensation, by restricting the free movement of native peoples and by increasing the penalties for failures to comply with state legislation.

The Malaysian courts, for their part, have gone beyond government's limited interpretation of NCRs. Most notably, the court ruled that a community's rights in land remain, even after the land has been reserved or gazetted by government for another purpose.⁵⁹ This said, more recent cases have rowed back on rulings which judge 'the common law respects the pre-existing rights under native law or custom'⁶⁰, instead asserting that Iban Dayaks do not rights to unsettled lands, so excluding hunting and foraging areas.⁶¹



Samuel's son playing on his father's boat (ketingting)

06 GREEN GOLD: BORNEO'S OIL PALM TAKEOVER

Palm oil is the 2nd most important oil in modern consumer societies, after petroleum.⁶² Indonesia and Malaysia together account for 87% of world production, which is expected to double by 2050 – with some 50% of all processed and packaged foods now containing derivatives of the commodity.⁶³ Today, oil palm accounts for the the highest source of foreign exchange in Indonesia – reaching an export value of US\$23 billion in 2017 or 15.9% of the total national exports.⁶⁴

In Indonesia, the expanse of the monocrop has been astronomical. Palm oil plantations have expanded from 3.6 million ha in 2008, to 11.5 million in 2015⁶⁵ before reaching 16.8 million in 2019,⁶⁶ with a further estimated 5.5 million ha of land in as yet undeveloped concessions.⁶⁷

Neighbouring Malaysia boasts similar levels of oil palm proliferation. By 2016, 5.74 million ha of the entire country was covered by oil palm monocultures, with the industry establishing itself as the 4th largest contributor to the national economy. The focus of this expansion has been in the Eastern states of Sabah (1.55 million ha) and Sarawak (1.56 million ha – where the area used for oil palm has doubled in the last 10 years⁶⁸), both situated on the island of Borneo.

Borneo is ground-zero for oil palm devastation, where between 2005 and 2015 the industry was responsible for at least 50% of all deforestation, including 2.1 million ha of Borneo's old-growth forest.⁶⁹

In Malaysian Borneo, palm oil is the largest destroyer of specie-rich rain forests. Between 1973 and 2015, industrial oil palm accounted for 57-60% of all deforestation in that region.⁷⁰ By 2016, there were some 8.3 million ha of industrial oil palm plantations across the island of Borneo. In the same year, the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi – KPK*) found that Indonesia lacked a credible and accountable system to prevent violations and corruption in the palm oil industry.⁷¹ KPK identified the permit issuance process for plantations to be particularly rife with bribery, noting that the lack of transparency in the process results in permits being issued over existing land claims or onto forest areas that are meant to be off-limits to plantations.⁷²

Indonesia's National Land Agency (Badan Pertanahan Nasional – BPN) has insisted on keeping the plantation permit data, which include maps and boundaries, out of the public's reach, in defiance of a 2017 order by the Supreme Court that the agency make the data publicly available.⁷³

Meanwhile, the country's palm oil lobby, the Indonesian Palm Oil Association (*Gabungan Pengusaha Kelapa Sawit Indonesia – GAPKI*), has repeatedly blocked any attempts to get the industry to become more transparent claiming that “opening up HGU [concession] data would hurt the palm oil industry as the data could be scrutinized by the public, thereby rocking the boat”⁷⁴.



Borneo is ground-zero for oil palm devastation, where between 2005 and 2015 the industry was responsible for at least 50% of all deforestation, including 2.1 million ha of Borneo's old-growth forest.”



The companies believe that there is no community in the area. There has never been any form of socialisation. Instead, we have a palm oil army who patrol their plantation. They don't want villagers around their company operations even though this is our land."

Village Representative, Bebenas Hamlet

Huwat Biseh listens to the sound of the hornbill bird (tinggang)

CASE STUDY – SURYA DUMAI GROUP

Corruption in the oil palm industry has yet to be thoroughly investigated, in part because the Ministry of Agriculture is subject to less scrutiny than the Ministry of Forestry.⁷⁵ A notable exception has been the case of Surya Dumai – whose Indonesian oil palm holding company, First Resources, has one of the largest land banks of any oil palm grower operating in East and North Kalimantan.⁷⁶ An investigation by KPK in 2007 discovered that company representatives paid bribes to provincial government officials to obtain permits for 11 of the company's subsidiaries to operate on 147,000 ha of land across Nunukan District, North Kalimantan.⁷⁷ Despite the courts finding the group guilty of corruption, First Resource's subsidiaries gained Roundtable for Sustainable Palm Oil (RSPO)⁷⁸ certification and realised their concessions – albeit through the manufactured consent of the indigenous Dayak Agabag communities whose lands are now within the group's grasp.

"The companies believe that there is no community in the area. There has never been any form of socialisation. Instead, we have a palm oil army who patrol their plantation. They don't want villagers around their company operations even though this is our land." Village Representative, Bebenas Hamlet

Community representatives from five Dayak Agabag villages in Sebuku sub-district were invited to Nunukan city – a day's travel from their respective homes – where they were entertained and coerced into signing agreement letters that declared the five communities had consented to the company's future operations. Representatives were not given any copies of the documents they signed, nor have they ever seen the Environmental and Social Impact Assessments (ESIAs) or High Conservation Value (HCV) assessments.⁷⁹ To this day, they do not know the terms they have agreed to or the rights forfeited. When representatives sought redress through the District government in 2010, they were met with intimidation. Due to the proximity of the plantations to the Malaysian border, the area is heavily militarised. Military personnel regularly intimidate community members who show any signs of objecting to the presence of the plantations. Even though the Nunukan District government has recently begun to recognise customary forest,⁸⁰ this usually comes after oil palm plantations have already been imposed on their ancestral lands. Communities only have the option to gain rights to small parts of their lands, when the majority of their territory has been permanently stolen from them.

07 THE MALAYSIAN COMPANY COUP

The government of Indonesia, its military and the country's plantation companies readily justify the enclosure of customary lands for large-scale plantation development by drawing on the discourse of national sovereignty, all the while Kalimantan's provincial governments' directly encourage Malaysian companies to invest in the borderlands.

In West Kalimantan, it is estimated that 70% of oil palm companies are majority owned by foreign, largely Malaysian, enterprises.⁸¹

In fact, much of Indonesia's success in expanding oil palm plantations is precisely because it opened the national economy to foreign investment, and attracted established corporate groups. Through single investments and joint ventures with local companies, Malaysian and Singaporean groups, often legally incorporated in tax havens and secrecy jurisdictions, now control more than two-thirds of the total production of the country's palm oil.⁸²

Malaysia remains the biggest investor in the Indonesian oil palm sector⁸³ and Malaysian companies already own 25% of the country's oil palm plantations.

Such is the influence of Malaysian corporations, a separate lobby group – *the Association of Palm Oil Plantation Investors of Malaysia in Indonesia (APIMI)* – was established in 1999 to represent palm oil estates of Malaysian origin.⁸⁴ APIMI, located in Jakarta, 'strongly defends the activities of plantations in Indonesia'. Chaired by Sime Darby Group (SDG), a Malaysian Government-linked company, members include other private-owned companies with close ties to the Malaysian government.⁸⁵

In recent years, Indonesian firms have enjoyed access to Malaysian capital and technology, while allowing Malaysian companies access to land and labour for upstream investment, as well as to CPO for their high-value downstream industries. All this comes at a huge cost to indigenous communities whose lands are taken with impunity, while foreign firms evade official investigation by the Indonesian government despite repeated incidences of social and environmental violations.⁸⁶ A prime example is the Sime Darby Group, whose close relationship with the Malaysian government has rendered the company to be "almost untouchable".⁸⁷



Malaysia remains the biggest investor in the Indonesian oil palm sector and Malaysian companies already own 25% of the country's oil palm plantations."

CASE STUDY – PT MAS

SDG, Malaysia's largest palm oil company, produces around 16% of all RSPO-certified palm oil. SDG prides itself on its socially responsible practices, having signed onto initiatives such as the United Nations Global Compact and the New York Declaration on Forests amongst others.⁸⁸ Despite these apparent commitments to sustainability, one of its subsidiaries PT Mitral Austral Sejahtera (PT. MAS) has been operating on 1,462 hectares of indigenous lands in Sanggau District, West Kalimantan since 1995.⁸⁹

The indigenous Dayak Hibun peoples of Kerunang and Entapang hamlets were deprived of their customary rights to their ancestral lands close to the international border when they were seized by PT MAS without their consent (FPIC),⁹⁰ a clear violation of the RSPO standard which is designed to avoid acts of land grabbing. Both communities filed a complaint requesting the restitution of their lands. Following years of inaction by the RSPO Complaints Panel and Dispute Settlement Facility, the dispute remained unresolved.

“The customary land that was seized by PT MAS – 1,462 hectares – must be returned to the communities of Kerunang and Entapang.” Redatus Musa, spokesperson of the Dayak Hibun indigenous people

In 2019, just as the case was taken to the Organisation for Economic Co-operation and Development (OECD) to begin the process of conflict resolution and despite vociferous NGO protests, Sime Darby sold their interest in PT. MAS to avoid their responsibilities to restore the community's customary rights⁹¹ - flouting an RSPO Resolution which calls on RSPO members not to divest operations which are subject to complaints.⁹² Meanwhile, despite this expression of bad faith, SDG continues to receive the financial backing from prominent financial institutions including Maybank, HSBC, Standard Chartered, Deutsche Bank, Credit Suisse and the Norwegian Pension Fund Institution.⁹³

“

The customary land that was seized by PT MAS – 1,462 hectares – must be returned to the communities of Kerunang and Entapang.”

Redatus Musa, spokesperson of the Dayak Hibun indigenous people



Dayak women engaged in a community meeting

08 INVESTING IN DESTRUCTION

The proliferation of extractive industries across the borderlands would not be possible without the financial support of big banks who provide loans and credit facilities to companies involved in the production of commodities such as oil palm, timber, coal and pulp and paper. It is through their finance that these industries are able to support not only their daily operations – from buying machinery to log and clear forest, to developing palm oil nurseries and maintaining agribusiness plantations – but their ability to raise further capital to expand and acquire new land and forest areas. Their investment fuels the global supply chain – from the construction of processing plants to the financing of shipping, trade and manufacturing of commodities.

In the last five years, more than USD \$48 billion in loans and underwriting supported 100 companies exploiting commodities directly connected to Southeast Asian tropical deforestation – USD \$10 billion of which was transferred from Malaysian banks to oil palm companies.⁹⁵ Maybank alone provided USD \$4.9 billion to the oil palm industry.⁹⁶

The bulk of this money originates from banks headquartered in China, Indonesia, Japan, Malaysia and Singapore. Many of the companies they finance operate in Indonesia's weak regulatory environment, which fails to uphold indigenous peoples' rights and allow untransparent permit allocation processes. The result has been the mass allocation of plantation concessions in areas that overlap lands traditionally owned and managed by the island's indigenous peoples. Land grabbing has been systemised, all the while the banking sector has failed to do proper due diligence on their clients or chosen to turn a blind eye to the impacts their financing has had on indigenous peoples. Despite global banks publicly committing to stopping human rights abuses in their supply chains, investments and portfolios, communities' rights are routinely disregarded by the companies they finance. Malaysian banks in particular continue to be the worst performers on environmental, social and governance risk assessment and mitigation.⁹⁷



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CASE STUDY – CIMB GROUP

CIMB Group, is one of Malaysia's largest banks. Linked to the Malaysian government, it is no secret that the State is a fierce protector of the palm oil industry, as one of the country's leading export commodities. Between 2014 and 2019, the group doled out more than USD \$3.5 billion to the palm oil to companies such as Asia Pulp and Paper and Wilmar International – both of which have been implicated in recurring fires and toxic haze during Borneo's annual 'burn season' as well as repeated violations of indigenous peoples rights.⁹⁸ Even with its new sustainability blueprint published in 2019, CIMB still fails to respect indigenous and customary land use rights, including indigenous peoples' right to free, prior and informed consent⁹⁹



Samuel's son surveys the forest

09 THE CONFLICT COMMODITY

The Indonesian government has been all too keen to browbeat critics in its defence of the industry, with the current administration threatening violence against anyone seen to be hampering investors.¹⁰⁰ The expansion of the industry remains paramount. The result of this ‘do or die’ approach to oil palm proliferation has led to the increased criminalisation of indigenous peoples attempting to defend their ancestral lands. Nowhere is this more evident than in Borneo.

Between 2007 and 2010, in West Kalimantan, 2,357 criminal cases were brought against local community members.

Citing Article 21 and 47 of the Plantations Act, many of the indigenous people were charged with illegal occupation, although they just remained on their lands after the agribusinesses moved in.¹⁰¹ Even after the matter was appealed to the Constitutional Court, which in 2011 struck down Articles 47 and 21 as unconstitutional, many companies delayed harmonising their practices with the Court’s decision.¹⁰²

The failure of the State to implement laws protecting indigenous *adat* rights or provide adequate remedies in land rights disputes, has left affected communities with no other option than to demonstrate, block the activities of companies or re-occupy their lands.¹⁰³ These actions are frequently met with heavy-handed security.

In 2016, Indonesia’s national human rights institution (KomNas HAM) reported that the majority of human rights violations committed in relation to land rights were linked to activities in the resource sector – primarily palm oil.¹⁰⁴

The KomNas HAM report found that community leaders had not been warned, consulted or compensated when concessions were handed out.¹⁰⁵ The proliferation of unresolved land conflicts is further evidence of a broken system. Under the Basic Agrarian Law, land is under the mandate of the National Land Agency of the ministry of Agrarian and Spatial Planning, while forestry laws devolve authority to the Ministry of Environment and Forestry to manage forests and forest lands. The lack of clarity over authority on land use only exacerbates tensions between concession holders and communities, all the while allowing the system to be captured by corruption.



In 2016, Indonesia’s national human rights institution (KomNas HAM) reported that the majority of human rights violations committed in relation to land rights were linked to activities in the resource sector – primarily palm oil.”

CASE STUDY – MUSIM MAS GROUP

Since 2004, Sambas District in West Kalimantan has been the subject of an oil palm takeover. Over 60% of the Province has been handed out to 35 oil palm companies. In 2010, one such beneficiary, PT Agrowiratama, a subsidiary of the Musim Mas Group (MMG) – a member of the RSPO and one of Indonesia’s largest vegetable oil producers (sharing 25% of the Indonesian palm oil refining market)¹⁰⁶ – began clearing 1,400 ha of farmlands claimed by Dayak and Melayu¹⁰⁷ indigenous communities along the Sambas Kecil river. This was done prior to ascertaining with full certainty who owned the land. Boundaries of customary territories were far from clear when company operations began. With the advent of oil palm, overlapping land claims over the Melayu village of Mekar Jaya surfaced – specifically from an elite Melayu family (*Panji Anom*) with ancestral links to the Sultan of Sambas. The timing of these competing claims should have raised concern over their legitimacy and authenticity. Despite this, company operations began without key documents being shared with the communities inside their concession – these included ESIA’s, HCV Assessments and participatory maps. Socialisation activities by the company were negligible, and where they have taken place, the company did not seek to include wider community participation.

In 2011, Sambas’ Bupati [regent] declared the government would put a hold on issuing permits for new oil palm plantations because there was no more land left [for oil palm]. This just shows how much land had been allocated.¹⁰⁸

The lack of transparency between the company and the community exacerbated uncertainties over land claims and rights. Community members in Beringin village, for example, were not made aware that if they relinquished lands in exchange for accepting smallholder (plasma) scheme offered by PT Agrowiratama, the majority of their lands would revert to State land upon expiry of the company’s Business Use Permit (HGU). When HCV assessments were shared with stakeholders, the study concluded that the planting of oil palm would have a ‘significant social impact on the basic requirement to the social sustainability of the local community’.¹⁰⁹ Yet, the study did not identify any areas as HCV 5, ‘areas fundamental to meeting the basic needs of local communities’, providing almost no protection of basic needs or local food security.

Government officials have highlighted a lack of capacity, resources and experience in handling the problems of clearing lands claimed by indigenous communities for oil palm. Most companies, officials admit, are not complying with the law and required procedures, all the while the government also concedes that it does not know where people cultivate their lands. Ideally, land clearance permits should only be issued by the local government after land acquisition has been completed, in reality, they are often issued before land conflicts are properly dealt with.

“

We used to think oil palm would not enter Sambas. This was before there was the borderland oil palm mega-project. We thought if [palm oil] would come, it would start in Kapuas Hulu, but apparently it started in Sambas.”

Spokesperson for Lembaga Gemawan

10 RHETORIC AND RULE-BENDING

To support the push for plantation development across Borneo, governments are increasingly using strong rhetoric to shift social attitudes towards large-scale oil palm development, whilst scapegoating traditional farming activities to shift attention away from the widespread forest destruction caused by the crop's expansion. One such myth assumes that oil palm brings development and alleviates poverty. This premise is refuted by scientific analysis of Government data from 6,600 villages in Kalimantan.

Between 2000 and 2014, in communities which previously relied on 'subsistence-based livelihoods', over 65% of people experience a substantial reduction in their basic, physical and financial well-being as well as reduced social and environmental well-being after oil palm was introduced.¹¹⁰

The findings demonstrate that when development is imposed without respect for indigenous peoples' rights, it severely impacts their livelihoods and welfare. The reality is, when oil palm moves in, indigenous peoples will either be forced to move or to become smallholders harvesting oil palm fruits for the companies that hold the plantations. They will lose their traditional means of subsistence and become wage labourers and indebted farmers working for the companies that have assumed control of their ancestral lands. It is for this reason that this situation both demands and compels urgent international attention and oversight.

Meanwhile, the responsibility for the annual fire and haze outbreaks that engulf Kalimantan every dry season continues to be onerously borne by indigenous peoples – ignoring the fact that fires predominantly originate from within the concessions of large oil palm groups and pulp and paper companies.¹¹¹



Huwat Biseh in Long Isun's longhouse

Based on satellite data, it is estimated that over 80% of fires during the annual dry season are caused by plantation companies or their sub-contractors for land-clearing.¹¹²

Such open burning is the most cost-effective method to clear land to flatten the stumps left over from logging, old crops, and to clear smaller vegetation in preparations for planting. To shift the blame away from the true culprits, there has been a concerted effort to prosecute indigenous groups expressing their cultural rights. While it is true traditional Dayak farming activities use fire to clear land for rice fields and other crops, these rotational, forest fallow, farming techniques are extremely sustainable as a plot is cleared and cultivated for only a few years, and then abandoned before the nutrients are leached out of the soil. The forests then regrow, re-establish soil fertility and re-absorb any carbon emissions resulting from clearance. The state however brand these practices as 'slash and burn', bringing with it the negative connotations that the soil has been wasted when in fact the reverse is true.

In 2016, Kapuas Hulu District issued a decree which stipulates jail sentences of 3-10 years and fines over US\$1.1 million to those who set fire to forests and farmlands. In the same year, a record number of indigenous farmers were arrested.¹¹⁴

This trend continues to this day in the borderlands¹¹⁵ - in 2020, Mahakam Ulu District (East Kalimantan) adopted similar legislation criminalising traditional farming practices. All the while, large palm oil corporations flout the rules meant to hold them accountable for burning millions of hectares of forest.¹¹⁶

Shifting cultivation practices are exploited in different way across the border in Malaysia. The Land and Surveys Department of Sabah, for example, is meant to recognise and protect Native Customary Rights (NCR). Yet, Sabah's Land Ordinance favours the conversion of the forest to permanent cash crops. Thus, NCR only applies to land that is in active use. Under the Land Ordinance, when land has been occupied for more than 3 years, at least a third of the land must be cultivated within this time period otherwise the State can reclaim the land.¹¹⁷

Fallow land cannot be claimed as NCR, making it very difficult for communities who still practice shifting cultivation to claim customary land.¹¹⁸ In fact, indigenous groups that rotate farmland, leaving areas fallow to regenerate over decades, can suddenly find their territories excised for plantations. These fears become all the more real when one considers that further palm oil expansion is planned in southwest Sabah into Murut and Kadazan Dusun indigenous lands.

In neighbouring Sarawak, non-participation in plantation agriculture has resulted in indigenous communities being labelled "anti-development", a brand with extremely negative connotations, not far removed from being "anti-government".¹¹⁹ Sarawak's officials repeatedly use this rhetoric to warn communities "not [to] make the customary right to your land cause you to be excluded from development".¹²⁰ In 2015, the then Chief Minister declared "we are not going to allow any more new plantations, except on communal and NCR land".

By 2016, over 380,000 ha of NCR land had been planted with oil palm, and a further 500,000 ha targeted for conversion.¹²¹

This is particularly alarming when one notes that the Government admits that only 1.5 to 2.8 million hectares of land are subject to (NCR) in Sarawak, however, the location and extent of these areas have not been made public and most communities remain unsure if their customary areas are recognised by the government as areas of NCR.

CASE STUDY – BIDAYUH DAYAKS OF GUMBANG ASAL BAU

Through the post-independence era, the Malaysian State Government has established several projects and land schemes involving the Native Customary Land of the country's indigenous peoples. In 1976, for example, the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) was established with the objective of developing customary land 'for the benefit of the owners', through the development of oil palm plantations.¹²²

The Bidayuh, historically known as Land Dayaks, have inhabited the area of Southern Sarawak since time immemorial.¹²³ The communities hold NCR over their lands, having occupied and used the same area since the time of their ancestors. With this in mind, the community of Gumbang Asal brought a long-standing complaint against the SALCRA and four private firms involved in the timber and palm oil trade.

The case concerns the community's NCR to their ancestral lands, where the community claim that their lands have been trespassed on by private enterprises constructing logging roads to extract timber, while SALCRA is accused of having commenced its agricultural scheme on the same land without their consent. The community has repeatedly contested the oil palm scheme SALCRA imposed on their lands but there has been no effort from the government or the companies to resolve the case. The case has since been brought to court and the people have made their demands clear:

"We want our land back".¹²⁴

“

The company that extracted the timber paid us for the usage of our land...but the oil palm company has not paid us anything”

Duek anak Atin, spokesperson for Bidayuh Dayak of Gumbang Asal Bau



Inei Yeq rests at her orchard

II THE PALM OIL MEGA PROJECT

The Palm Oil Mega Project (POMP) and the plan to develop the world's largest oil palm plantation across the Kalimantan borderlands was widely criticised both nationally and internationally when it was first launched. UN CERD requested actors in the region to secure the possession and ownership rights of local communities before proceeding further. This resulted in the extensive planning proposal being hastily turned down by the minister of forestry, who said his ministry would stop any new conversion of forest into plantations.¹²⁵

In 2007, the UN CERD voiced its concerns noting the disproportionate threat “[POMP] constitutes to the rights of indigenous peoples to own their lands and enjoy their culture.”¹²⁶

A few years after the grand plantation plan had disappeared from the radar of the national and international media, the first plantation companies entered the borderlands with approval from district governments supported by regional police and military.¹²⁷ One of the pioneers in propagating agribusiness in the post-POMP era was Indonesia's largest producer of oil palm – Sinar Mas, the corporate name of the huge Indonesian conglomerate that owns Golden Agri Resources (GAR), a large natural resources development company based in Singapore. The expansion of the monocrop into indigenous lands did not go wholly unnoticed precisely because Indigenous communities continued to complain about it.

The UN CERD reiterated its concerns in 2009, observing “oil palm plantations continue to be developed on indigenous peoples’ lands in the Kalimantan border region without any apparent attempt by the State to comply with the Committee’s recommendations or to otherwise secure and protect indigenous peoples’ rights.”¹²⁸

By this stage Indonesia was establishing itself as the world's largest producer of oil palm, a position it still holds today, and the borderlands, for their part, were designated as the new centres of economic growth, where large-scale plantations were to be the main economic drivers.¹²⁹ UN human rights mechanisms continued to express concern, observing in 2013 that Indonesia's laws and practice violated international norms prohibiting racial discrimination insofar as under “law as currently drafted, indigenous peoples ... have been denied rights to their lands in favour of an ownership right vested by

the State” in private companies, such as those that have been or will be issued plantation permits or concessions along the Kalimantan border.¹³⁰

In short, Indonesia’s law and practice in relation to these massive monocrop plantations and concessions are incompatible with indigenous peoples’ ways of life and internationally guaranteed rights.

This is not hyperbole; former UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen plainly stated that plantations in Indonesia are placing indigenous peoples “on the verge of completely losing their traditional territories and thus of disappearing as distinct peoples.”¹³¹ That severe violations of indigenous peoples’ rights and irreparable harm are prevalent in relation to Indonesia's deficient laws and practice in the forestry sector is further verified by other UN treaty bodies and Special Procedures.¹³²

Special Rapporteur, Raquel Rolnik, observed that indigenous peoples’ “claims to the land are not recognized by the State,”¹³³ and “[c]onversion of land uses has had significant impact on natural resources and land rights of forest-dependent communities.”¹³⁴ In 2018, another Special Rapporteur on the Right to Food, Ms. Hilal Elver, confirmed that indigenous peoples in Indonesia “face *disproportionate* barriers to accessing land” and that this discriminatory treatment is exacerbated by the fact that their “livelihoods and food sources depend considerably on the free use of land.”¹³⁵ She also corroborated that Indonesia continues to “lack ... formal methods to determine customary rights to land” within its property laws¹³⁶ and that “land-related conflicts have had devastating human rights impacts.”¹³⁷

Similarly, World Bank studies document that Indonesia’s policies supporting the expansion of timber and oil palm plantations have “marginalized and alienated ... indigenous peoples from traditional lands and uses, through denial of rights and access,” and that such denials have been “backed by force.”¹³⁸

These damning findings confirm that there have been no effective changes in terms of protections for indigenous peoples’ rights in Indonesia since POMP was supposedly ‘shelved’. Systematic flaws continue to persist and concerns regarding indigenous peoples’ rights prevail.

CASE STUDY – GOLDEN AGRI RESOURCES (GAR)

The main vehicle for GAR's extensive palm oil holdings is grouped together as PT Sinar Mas Agro Resources and Technology Tbk (PT SMART). A member of the RSPO, PT SMART's subsidiaries came under fire for violating RSPO's standard as damning evidence demonstrated they were responsible for destroying swathes of forest and clearing areas of peat. In response, GAR adopted a Forest Conservation Policy in 2011,¹⁴⁰ by which it agreed not to clear any more forests or areas of peat.¹³⁹ GAR committed to develop a new policy by which they could zone their concessions for areas of High Carbon Stocks (HCS) and then exclude them from future clearance. In 2013, Forest Peoples Programme was invited by GAR to independently assess the social aspects of this pilot in Kapuas Hulu district, West Kalimantan.

Kapuas Hulu district is located in the northeast quarter of West Kalimantan and is scarcely populated with limited road access. However, in 2006, substantial land concessions began to be issued. In the space of three years PT SMART received 9 such concessions along the borderlands (amounting to a total area of 159,500 ha), one of which was managed by subsidiary PT Kartika Prima Cipta (PT KPC). Field studies of the implementation of the new High Carbon Stock policy in PT KPC revealed an alarming lack of respect for the rights of local Dayak Su'aid and Dayak Mayan communities to give or withhold FPIC to the subsidiary's development plans.¹⁴¹ Nugatory compensation was provided to individual Dayak farmers, to pay them for the loss of the use of their farmlands, without explaining that in the process of accepting these payments their rights were being permanently extinguished. To comply with international standards, any such compensation must also consider the collective rights involved and as must the process by which decisions are made in this regard.



**The main message from this community is:
Enough. We don't want to release any more land"**

Village spokesperson, Menapar village

This disturbing pattern of exploitation was found across GAR's 18 concessions in Kalimantan, triggering a complaint to the RSPO. In 2015, RSPO found that GAR's operations were in breach of RSPO standards.¹⁴³ The RSPO Complaints Panel ruled that the company should not acquire or clear any new lands until it had remedied these problems in all 18 concessions subject to the complaint. After understanding the legal implications of the imposed concessions, local Dayak communities inside PT KPC's concession decided to reject the long-term company permit over their lands. Despite this, the case remains unresolved and GAR has yet to comply with the RSPO's requirements.

"There is not enough lands here for our grandchildren. We want to work our own land ourselves. We don't want to work as coolies on our own lands. We want to work our land under our own control."
Village spokesperson, Kerangas village

To date, HCV assessments for 17 GAR concessions have still not been finalised and shared with communities; land disputes resulting from the original land acquisition by PT KPC remain unresolved and new unresolved disputes have surfaced from proposed smallholder allocations; the remediation process in PT KPC has stalled and GAR is refusing to renegotiate land acquisitions carried out without proper FPIC; while minimal progress has been made in other concessions¹⁴⁵. In 2018, five further complaints were submitted to the RSPO due to inaction as GAR continues to operate in violation of the Complaint Panel's decisions and RSPO standards.¹⁴⁶ In 2020, a further complaint was submitted alleging that several of GAR's operations did not have required permits, lands had been cleared without adherence to RSPO's New Planting Procedures and that GAR had been found guilty of trying to bribe government officials to get them to drop charges of violating permitting requirements.¹⁴⁷

12 JOKOWI'S FALSE PROMISES

In 2013, the country's Constitutional Court delivered a landmark judgement which "reclassified traditional indigenous lands as privately owned by indigenous peoples, rather than as 'state forests'" and ruled that the prior classification of these lands as 'state-owned forests' under the 1999 Forestry Act is "unconstitutional."¹⁴⁹ Hopes of indigenous rights recognition were further buoyed in 2014 when Presidential Candidate Joko Widodo ('Jokowi') pledged to return millions of hectares of land to the country's indigenous peoples. The reality of Jokowi's presidency has been somewhat different.

While 1% of the country controls 59% of Indonesia's agrarian resources and land,¹⁵⁰ less than 1% of the country's indigenous communities have received official title to even small parts of their traditional lands - covering a meagre 35,202 hectares of customary forests according to official data . A mere handful of these are in the Kalimantan border region. This is out of an estimated 40 million ha nationwide traditionally owned by indigenous communities.¹⁵¹

In April 2019, the Ministry of Environment and Forestry issued a map of customary forests covering an area of 472,981 ha, with a plan to identify, verify, and validate other customary areas.¹⁵² This juxtaposes the 10 million ha identified by the Ancestral Doman Registration Agency (BRWA),¹⁵³ a conservative estimate compared to Indigenous People's Alliance of the Archipelago's (AMAN) research which identified between 40 and 70 million ha of indigenous land's across Indonesia.¹⁵⁴ The exclusion of millions of ha effectively signals the government's denial of the existence of indigenous lands.

Furthermore and contrary to basic international human rights standards, the Widodo administration continues to interpret the Constitution to require that indigenous communities' "existence" must be officially certified by District and/or Provincial governments via decrees or regulations if they are to access and secure legal rights and protections. As the National Human Rights Commission, KomNas HAM, has highlighted, "very few indigenous peoples have gained official recognition."¹⁵⁵

As of 2019, "regional governments have granted a measure of legal recognition to only 48 [peoples]," less than 3% of the indigenous peoples identified by the national indigenous peoples' organization, AMAN [2,359 indigenous peoples]"¹⁵⁶, essentially rendering the remaining 97% invisible in the eyes of the law.

So while Indonesia's plans to establish an 'oil palm belt' along the borderlands should be illegitimate under national law, in actual fact, plantations continue to proliferate and operate with impunity due to the state's failure to implement the judgment of the Constitutional Court or to otherwise recognize and secure indigenous peoples' rights (e.g., via effective legislation even though a bill has before the legislature for over a decade) . No remedy has been provided for the previous takings of indigenous lands, and communities must now navigate burdensome recognition procedures to have any chance of land security. The urgent need for effective protections has become all the more pressing due to Jokowi's focus on infrastructure expansion which has begun to open up previously inaccessible indigenous lands to investors.

CASE STUDY – THE DAYAK IBAN OF SUNGAI UTIK

“The Kapuas Hulu government was slow to recognise our customary forest. It took more than seven years.” Apay Janggut, Village Head of Sungai Utik

As noted, substantial oil palm concessions were not issued in the Kapuas Hulu District, West Kalimantan until 2006. Improved infrastructure and incentives from local government led to the development of large oil palm plantations.¹⁵⁷ Most plantation permits were handed out by the District Government to four large oil palm consortia without first recognising and securing the indigenous peoples’ customary or *adat* lands.¹⁵⁸

“By 2013 large plantations already covered 14% of the entire District or 74% of land categorized as Non-forest area (area penggunaan lain) where oil palm cultivation is permitted.”¹⁵⁹

After a seven-year-long struggle, the Dayak Iban indigenous community of Sungai Utik was able to gain some recognition for its land rights,¹⁶⁰ but it is one of only two indigenous communities that have been “able to register their communal rights in West Kalimantan.”¹⁶¹

Under Indonesia’s current restrictive laws, indigenous communities are required to map their lands before petitioning their local legislature to issue a regulation recognizing their existence. The community must wait (sometimes years) for the Regional Assembly to approve the regulation granting them indigenous status. Only at this juncture can the community submit a customary forest application to the Ministry of Environment and Forestry, and following its approval, may receive customary forest rights. Despite the vast number of indigenous territories that have been mapped, very few have been legally recognized. Kalimantan’s borderlands - an area traditionally inhabited by indigenous Dayak groups in the highland interior and Melayu communities along the inland rivers and in the coastal lowlands - is no different.

Across the whole of Kalimantan, of the 391 indigenous territories mapped, only five have had their lands recognized by the relevant local government body and only two of these have been in the borderlands.¹⁶²

It was not until 2018, for example, that the Kapuas Hulu District government passed a local regulation (*Peraturan Daerah*) recognising the existence of ‘customary law communities’ (*masyarakat hukum adat* or indigenous peoples) in the District, in line with the prevailing interpretation of the Constitutional provision that their rights only can be recognised “so long as they still exist.”¹⁶³ Three other Districts in West Kalimantan have adopted local regulations for recognizing the existence of indigenous peoples.¹⁶⁴ However, this is not the end of this process and nor is it, by itself, an effective guarantee or protection for indigenous peoples’ rights.

“The government has not been able to protect the forest. It is our community’s traditions that protect the forest. We patrol the forest to protect it from outsiders who come to cut our trees.” Apay Janggut

The process to register communal land rights requires the existence of local regulations. A process that can be thwarted by districts which have no established recognition procedures. Where regulations do exist, multiple, time-consuming criteria need to be satisfied. Once fulfilled, indigenous groups are then required to apply to different authorities at different levels—district, provincial, and national—seeking recognition of their rights to *adat* areas, forests, institutions, and knowledge. These processes are extremely burdensome and difficult to track.¹⁶⁵ e.g., And ultimately ineffective to the extent that they don’t adequately guarantee the complex of rights that coalesces around indigenous title to lands.

“

“This forest is our mother. If we do not protect it, it will be angry. And if it is angry, there will be many disasters”.

Apay Janggut

13 TRANS-KALIMANTAN/PAN-BORNEO HIGHWAY PROJECT

In 2019, President Widodo announced plans to relocate the capital city, from Jakarta, to a yet-to-be-built city in the province of East Kalimantan - the province with the highest 'economic growth' (44%) on the island, generating gains to the national economy through mining, agriculture and commercial plantations. The expectation is that once the new capital is completed by 2024, the island of Borneo will take on increasing strategic significance as one of South East Asia's 'growth' areas. This has attracted renewed interest from international lenders and investors, buoyed by the current government's policy of economic deregulation and one-stop permitting.¹⁶⁶ This in turn has cemented Widodo's ambitious plan to build 'a complete network of highways linking the remotest parts of Sarawak and Sabah to East Kalimantan, where the new Indonesian capital will be located'.¹⁶⁷

The Trans-Borneo highway, which is expected to be completed in the next 10 years,¹⁶⁸ will complete the circle of highways looping the island, ensnaring the last of Borneo's forest in an ever-tightening noose.

This is a huge boost to Indonesian palm oil companies who tend to trade at a discount to their Malaysian counterparts due in part to the country's "weak and decaying transportation infrastructure".¹⁶⁹ Soon after winning his second term, Widodo responded to these concerns, announcing "the only way for Indonesia to have higher economic growth is [through] connectivity"¹⁷⁰. The large-scale investment in an economic corridor along the border between Malaysia and Kalimantan is integral to this vision. A project that builds on the Indonesian Master Plan for the Acceleration and Expansion of Economic Development 2011-2025 (MP3EI), which set aside US\$242 billion for transportation-related infrastructure.

The Trans-Kalimantan Road Network project - which includes the upgrading and construction of 16 routes extending over 5,316 kilometres across the island - is seen as the vehicle to deliver increased commercial connectivity on the island, particularly for the primary industries of coal mining, oil palm plantations, and industrial logging.

The road network would link up with the Pan-Borneo Highway, connecting the Indonesian provinces to 2,333 kilometres of major roads across Sabah and Sarawak in Malaysian Borneo, effectively slicing up Borneo's last remaining forest blocks¹⁷¹. Both projects pose unprecedented threats to indigenous peoples on either side of the frontier, especially when coupled with ambitious plans to prioritise the creation of new oil palm "zones" on the Indonesia-Malaysia border.

In the context of both these large-scale infrastructure development schemes, the Heart of Borneo (HoB) - a voluntary agreement, lacking the force of law - is especially vulnerable. The inherent unilateral nature of the 'Pan Borneo' and 'Trans-Kalimantan' clash directly with the trilateral international collaboration and territorial integration required for the HoB to be effective. Thus, Indonesia and Malaysia's plans to exploit the island's natural resources across the borderlands, driven by federal economic agendas, run counter to the conservation objectives of the initiative. While Malaysian Plans for industrial development seek to quadruple Sabah's GDP over 2008 - 2025, by expanding the Pan-Borneo highway network through the HoB, the trans-border highway (the northern link of the Trans-Kalimantan), driven by Indonesia's MP3EI, transects 1,920 kilometres of the HoB spine along the Malaysian border.

The new roads effectively “isolate hundreds of thousands of hectares of Protected Areas”.¹⁷²

The fragmentation of the HoB due to road developments has led many commentators to warn that deforestation will be accentuated by permitting new economic activities, all-season access to forests, and lower transportation costs for extracted resources,¹⁷³ just as has been observed in the Amazon basin. Moreover, in Kalimantan the task of administering the initiative is delegated to the provincial and district governments who in recent years, as financial support from the central government has dwindled, have become more heavily dependent on exploiting local resources. As nature conservation does not generate a great deal of income, district officials are inclined to look for more lucrative sources of revenue and profit. These are commonly found in the extraction of natural resources, whether this be mining, commercial logging, or oil palm.

The Governments of Indonesia and Malaysia favour public and private sector investments over securing and respecting indigenous peoples’ rights. This has only resulted in a growing number of land conflicts due to competing land claims over limited resources.

In Malaysia, there are 300 NCR cases pending in court involving disputes between native communities and land development agencies, private plantations and logging companies.¹⁷⁴

It is important to reiterate again at this point that NCR jurisprudence has a number of flaws and limitations. NCR are formally recognised when a community registers a claim at the district land office, however, each family is allowed to register no more than 15 hectares as indigenous land, but collectively communities traditionally reserve far more land, especially in

reference to future use. Similarly, the procedure for processing land rights claims is very slow. In many cases, indigenous peoples in Malaysia wait more than five years for their cases to be processed. At the same time large companies wanting land ten times the size of the local person has its case processed within a two-year period. Despite the various legal procedures designed to protect indigenous peoples’ rights, these have been unenthusiastically applied and offer little security or protection.¹⁷⁵ The result is increasing land conflicts.

Similarly, across the border, the consortium for Agrarian Reform (KPA), Indonesia’s largest agrarian movement organisation reported 2,047 conflicts during Jokowi’s first term (2015-2019) – an increase of 56% over previous President Yudhoyono’s second term (2010 to 2014).¹⁷⁶

These conflicts “predominantly involved land for plantation, forestry and infrastructure”, a process that is typified in the Kalimantan border region. Nowhere is this more evident than in the Province of West Kalimantan, which boasts six of the island’s top palm oil producing Districts - five of which are located at or near the international border.

In West Kalimantan between 2012 and 2016, the amount of land dedicated to oil palm rose by 36%. During the same period, the violation of land rights was the most common cause of conflict between indigenous Dayak communities and plantation companies, responsible for 53 of 119 (45%) recorded conflicts.¹⁷⁷

CASE STUDY – PT LEDO LESTARI

In 2010, PT Ledo Lestari, an oil palm company, expanded its operations and relocated all the residents of Semunying Bongkang community, placing 11 families in ‘company camps’ scattered around the plantation. These families are still awaiting permanent homes. The resettlement process involved forced evictions, where company representatives burned the houses at the original village site.¹⁷⁸ The company resettled a further 21 families into permanent housing in another location on the plantation. Residents have noted that the new site ‘is a shelter, not a community. It is owned by the company’. The families have never been given title to the lands on which they are now living. The new sites have restricted access to food and portable water.

“When we lost the forest, we lost everything.” Mormonus, Village leader Semunying Jaya

Community members continue to raise concerns over the loss of water sources due to the company’s operations, river pollution due to the excessive use of pesticides in the company’s operations, and the impact on their ability to meet subsistence needs due to depleted fish populations and a lack of farmland. In 2014, the villagers sued the company and the Bengkayang District in the District Court, seeking the cancellation of permits, the return of their customary land, and compensation for losses suffered. In 2018, the District Court rejected their claims on the grounds that the community did not have a land title issued by the government showing that they are a recognised indigenous group with customary rights to the land in question.¹⁷⁹

“

The forest used to supply all our needs. Now if the rain come, everything floods. The forest is gone. There is no way to hold back water. We can’t plant anything. We lost everything to palm oil.”

Lindan, Semunying Bongkang



A young Dayak women wears traditional dress during the annual Hudoq festival

14 CHINA'S BELT AND ROAD INITIATIVE

It is no coincidence, that these huge infrastructure projects are intertwined with China's Belt and Road Initiative (BRI; initially known as "One Belt One Road" or OBOR) - an initiative which seeks to address the "infrastructure gap" across 69 countries (touching 70% of the world's population) by developing new trading routes to and from China. First announced by President Xi Jinping in 2013, under the guise of "internationalizing" China, critics argue the enormous BRI investments - projected to exceed USD\$1 trillion - serve to utilise China's surplus construction capacity to extract much-needed natural resources from each of the project's recipient countries¹⁸⁰. To some extent backed by the newly-formed Asian Infrastructure Investment Bank (AIIB)¹⁸¹, and other lenders in which China plays a pivotal role,¹⁸² these new institutions promise faster project approval processes with less bureaucratic red tape, disrupting the previously rather settled landscape of international development finance.

AIIB is particularly relevant because it provides a strategic vehicle for China to exert 'soft power' over countries like Indonesia and Malaysia through infrastructure loans.

When AIIB became operational in early 2016, the bank published its environmental and social framework which contains broadly similar standards to those of other international financial institutions. Progressive areas include the exclusion of financing for commercial logging operations in tropical or old-growth forests, which goes beyond current World Bank Group (WBG) standards.

The most noticeable gaps in AIIB's policy, however, include the failure to give indigenous peoples the right to give or withhold consent to activities taking place on their lands. A draft of the AIIB's new policy, expected to be approved February 2021, disappointingly retains this exclusion.¹⁸³

Free, Prior and Informed Consent (FPIC) for indigenous peoples is a right expressly recognised in mandatory standards adopted by AIIB's Multilateral Development Bank peers, including WBG, its private-sector lending arm, the International Finance Corporation, and the ADB. The failure to recognise FPIC is particularly worrying when one considers AIIB has moved to fund overseas projects with "streamlined environmental and social safeguards"¹⁸⁴. All the while AIIB co-finance partners in Indonesia, WBG, have introduced new standards described by some experts, including Laurance, as weaker than the lender's previous framework. Commentators fear that this type of competition fosters a race to the bottom in standards and quality among multilateral lenders.¹⁸⁵

CHINA'S GROWING DEMAND

For both Indonesia and Malaysia, China's value to the palm oil trade has significantly risen in the last two decades. Beijing's demand is only expected to increase in the coming years, due in part to the ongoing U.S – China trade war and COVID-19 health crisis that has affected the country's soy volumes and supply chains. In response Beijing has looked for alternatives, including substituting palm oil for soy as a cheaper edible oil, while increasing its use of palm oil for biofuels as an alternative to crude oil.¹⁸⁶

As the second largest importer of CPO, and its derivatives, China absorbs 13% of global trade in the commodity.¹⁸⁷

Investments into the plantation business have significantly increased in recent years, Tianjin Julong Group – China's oil palm industry leader – already controls 200,000 ha of integrated palm oil plantations in West Kalimantan¹⁸⁸ and is seeking to reach half a million hectares over the coming years.¹⁸⁹

Already, by 2019, China was Indonesia's second largest buyer of CPO with imports rising by 6.3% to reach their highest annual rate on record.¹⁹⁰ Reciprocally, for both Indonesia and Malaysia, the Chinese market is increasingly attractive as it holds the demand potential to offset expected sales declines elsewhere – particularly from Europe which is seeking to phase out the use of palm oil in biofuels by 2030.¹⁹¹

Oil palm already occupies 71% of the total agricultural land of Malaysia and 90% of Sabah's agricultural land.¹⁹²

Meanwhile in Sarawak, although the Chief Minister has committed to the preservation of 80% of its land as primary and secondary forest, concession boundaries for oil palm already cover one-third of the State's land area. If the government is to honour its commitment it would need to reverse 30% of its existing concessions.¹⁹³ As the production of Malaysian CPO stagnates, owing to land scarcity, degradation and labour shortage¹⁹⁴ Borneo's borderlands take an increasingly vital role if the industry is to fulfil external supply demands.

Pressure to exploit Kalimantan's 'untapped' frontier is further heightened when one considers how opening up the last tract of the island's rainforest will offer a huge coup for the tropical timber industry. China is the main market for lumber from Borneo and currently the largest importer of tropical logs, a position previously held by Japan.¹⁹⁵ It is no secret that China's export-oriented processing industry is hugely dependent on cheap tropical logs. This compounded with growing domestic demand is likely to fuel an increase in the illegal timber trade generated by forest clearing for palm oil plantations on the one hand, and networks of illegal loggers on the other.¹⁹⁶

15 WEST BORNEO ECONOMIC CORRIDOR

Both Indonesia and Malaysia have signed BRI cooperation agreements with China, but AIIB remains a relatively new entrant in international development financing on the island of Borneo. The first phase of the upgraded Pan-Borneo highway was funded as part of the BRI¹⁹⁷ (although principally financed by the Malaysian government and government-affiliated companies¹⁹⁸) and built on plans to develop a road network across the island that date as far back to 1949 when the British Crown first paved 210 kilometres of asphalt across Sabah (then North Borneo)¹⁹⁹, but BRI-linked investments in Malaysia are not solely focused on road-building.

The concept of ‘Special Economic Zones’ (SEZs) – an increasingly popular mechanism in Southeast Asian for promoting investments – are not new.

The concept of SEZs are not new. The ADB has been championing SEZs since it first entered the vernacular of the International Labour Organization (ILO) in 1987²⁰⁰ and the idea of a West Borneo SEZ has roots in the East ASEAN Growth Area (EAGA), an initiative launched in 1994 to accelerate economic development across the nations of Brunei Darussalam, Indonesia, Malaysia and the Philippines (BIMP). BIMP-EAGA envisioned a “private sector-led and market-driven” trade initiative to make “the best use of common infrastructure and natural resources”.

In 2004, ADB evolved the concept of SEZs to create Special Border Economic Zones (SBEZ) to ‘stimulate cross-border trade and investment’. This was the thinking behind the ‘West Borneo Economic Corridor’ which aimed to boost trade along approximately 1,500 kilometres of the Malaysia-Kalimantan borderlands.

In 2012, this was formally incorporated into BIMP-EAGA’s strategy under the Implementation Blueprint (2012-2016) and later into the initiative’s ‘Vision 2025’ during the BIMP-EAGA Summit in 2017. The first stage of the West Borneo SBEZ would be to establish ‘a corridor system’, a precondition to which would be road connectivity between Borneo’s Malaysian states and Kalimantan’s provinces. In ADB’s ‘Country Operation Business Plan’ for Indonesia 2020-2022, USD \$300 million was earmarked for ‘Kalimantan’s National Roads Development Project’ aka the Trans-Kalimantan road network.²⁰¹

Once established, ADB notes “foreign investments concentrated in large companies with vested interests in extracting raw materials or profiting from low-cost factors of production” will act as the ‘driver’ for border area development.²⁰² In two separate pre-feasibility studies carried out by the bank – focusing on ‘Sarawak-West Kalimantan’ and ‘Sabah-North Kalimantan’ – a number of priority industries were identified, namely palm oil and wood products. Alarming, ADB’s Social Analysis of the Trans-Kalimantan (May 2020) classified the project as “likely to have limited impacts on indigenous peoples”, despite noting “involuntary resettlement impacts on a high percentage of ethnic minorities, including the Dayak and Banjar peoples in North and East Kalimantan, are expected.”²⁰³

This is particularly worrying in the context of the recently enacted Omnibus Law which facilitates the expropriation of indigenous lands by expanding the definition of ‘public interest’ to include acquisitions for the purpose of establishing SEZs.

ADB is principally controlled by Japan and the United States (which each hold 12.7% and 12.8% voting share, respectively, meaning either country can veto any loan decision). The emergence of AIIB has caused some commentators to speculate that two different ‘visions’ of Asia are set to converge, as AIIB has stated since its inception, the bank would not fund projects independently in the first phase of its development, instead co-financing projects. Both ADB and AIIB have begun to co-finance a number of projects in other parts of the region.²⁰⁴

Supporting ADB in the West Borneo Economic Corridor may be an attractive investment for AIIB. In 2017, Indonesia’s current Finance Minister, Sri Mulyani Indrawati (former World Bank managing director²⁰⁵), voiced hopes of collaboration publicly when she noted “AIIB is going to continue to look for potential projects... and this [offers] a good chance for collaboration with ADB who have more experience in project preparation”.²⁰⁶ SEZ have been targeted by AIIB in Indonesia and the project is already marred in controversy. A report published in March 2020 found ‘extensive and systematic evictions’ of indigenous peoples, allegations of land grabbing, intimidation and repression by security forces and opaque development planning in Pujut sub-district, Mandalika SEZ.²⁰⁷

‘THE GOLDEN TRIANGLE OF BORNEO’

The recently established Province of North Kalimantan houses some of the island’s last remaining intact rainforest. Roughly 69% of the Province’s total area is classified as forest, making it a prime target for investors.

Plantation development has already been highlighted in the Provincial Government’s 2020 master plan as one of the Region’s ‘principal components’²⁰⁸ for the border development program.

This is to be facilitated through an ‘expanded network of interconnected roads to the [Malaysian] provinces of Sabah and Sarawak’. The new links, already under construction, consist of 525km of paved roads. These transport links will slice through the Heart of Borneo, connecting Long Pasia (Sabah), Ba’Kalalan (Sarawak) with the previously isolated Long Bawan (North Kalimantan) by road.²⁰⁹

The new ‘development’ corridor, officially titled the ‘Lundayeh Economic Zone’ (LEZ) – named after one of the regions indigenous Dayak peoples - aims “to harmonize cross-border value chains between Malaysia and North Kalimantan”.²¹⁰ The focus will be on increasing the outputs of North Kalimantan’s principal industries - mining, forestry and agriculture (principally oil palm) – and the export of a few unprocessed products, specifically crude palm kernel oil, crude palm oil as well as bituminous coal and plywood.

An ADB scoping study speculates that logging and oil palm offer the highest economic internal rates of return (25.5% and 16.5% respectively), with both industries ‘poised to deliver the needed resources to support Sabah’s manufacturing expansion [into] premium palm oil-based biochemicals, biomaterials, and high quality foods’.²¹¹ The Malaysian State has already invested in the world’s first oil-based palm bio-refinery complex in expectation of increased levels of CPO from North Kalimantan.²¹² This accompanied by the opening of new customs facilities across the borderlands, stretching from Nanga Badau in Kapuas Hulu District²¹³ down to Aruk in Sambas district, will only increase integration across the industry.



Samuel and his son check their fishing net

16 THE INTEGRATED BORDER DEVELOPMENT PROGRAM

When AIIB announced the approval of its first four loans in June 2016, it was little surprise that Indonesia was among the recipients. Under President Widodo, Southeast Asia's largest economy has ardently supported the AIIB and boosted its relationship with China, viewing Beijing and its initiatives as a vital part of funding efforts to improve its 'barely functioning' infrastructure. China, for its part, has been keen to oblige. In 2017, AIIB approved USD100 million to co-finance Indonesia's Regional Infrastructure Development Fund with the World Bank through a financial intermediary, PT Sarana Multi Infrastruktur (PT SMI), to "provide loans for economically viable infrastructure projects". PT SMI have previously cited the Trans-Kalimantan as one such viable project.²¹⁴

China is already Indonesia's largest trading partner (with bilateral trade reaching US\$79.4 billion in 2019)²¹⁵, and from a strategic perspective, investment in Indonesia - a leader within the ten-member Association of Southeast Asian Nations (ASEAN) - boosts the emerging superpower's diplomacy in the region. This strategy appears to be undeterred by the ongoing COVID-19 pandemic. In July 2020, President Xi Jinping reiterated China's commitment to multilateralism through the support of AIIB to act as "a new type of development platform".²¹⁶

In 2016, the Government of Indonesia announced a new Integrated Border Area Development (IBAD) Program, prioritizing Kalimantan's borderlands as a 'key area' with West Kalimantan serving as one of the 'test' provinces.

The IBAD program is characterised by "industries [that] can be spread across the entire province" through "hard infrastructure". The following year, Indonesia launched a five-year plan to promote infrastructure construction. Indonesia's Ministry of Finance predicts that the country's infrastructure construction will require approximately US\$429.7 billion in the medium-term (with 42% coming from private sector), a funding gap expected to be plugged by Chinese investment.²¹⁷

In 2017, Widodo announced that he wanted a third of all funding from investors and state-owned companies to come from the AIIB.²¹⁸ The country has since become ASEAN's largest recipient of BRI-related capital investments (US\$ 171 billion).²¹⁹

Following a turbulent re-election, Indonesia witnessed a temporary 73% decline in foreign direct investment (FDI), in part due to continuing delays in land acquisitions. In response, the Widodo administration pushed through a slew of amendments to existing legal and regulatory protections that are specifically designed to further privilege the rights of companies over the internationally guaranteed rights of indigenous peoples.²²⁰ The true effect of the Omnibus Law is not yet known, but with an independent watchdog reporting a more than 50% increase in the number of cases of corruption in infrastructure and procurement projects between 2015 and 2018,²²¹ ultimately it will be local communities and the environment that pay the price.

The Omnibus Law represents one of the biggest legislative changes in the country's history and creates significant impediments to the legal recognition of indigenous land rights while also greatly expanding the options for government expropriation of indigenous lands. The provision of a Land Bank, to serve as a State-owned entity with the authority to compulsorily acquire 'abandoned lands' - defined as those that are not cultivated or utilized by rights-holders within a two-year period - is perhaps the most abhorrent of the new changes. A provision which appears to reinstate the colonial concept of *terra nullius*, whereby the State is able to deny the land rights of the country's indigenous peoples through its own arbitrary definition of 'abandoned lands', and compulsorily acquire indigenous peoples' lands without any free, prior, or informed consent and without fair and just compensation.



Tekwan Yeq looks pensively whilst sitting in his orchard.

At the same time, the Omnibus Law fails to address the underlying cause of land conflicts from Business Use Permits (Hak Guna Usaha – HGU), which extinguish in perpetuity communities’ [customary] rights to land.

Furthermore, recently adopted Indonesian laws and regulations²²² concerning road construction in forests are likely to facilitate increased migration and incursions as they contain weaker protections for forest areas, which are often critical for indigenous communities’ livelihood and other needs.²²³ Meanwhile, the outbreak of COVID-19 has done little to dampen China’s interest in its’ ambitions for BRI.

In April 2020, AIIB announced that “the outbreak [of COVID-19] underscores the importance of infrastructure development”²²⁴, ignoring the scientific evidence that the expansion of industrial agriculture in the tropics facilitated through roadbuilding is in part responsible for the proliferation of deadly pathogens²²⁵ and warnings from the UN summit on biodiversity that if levels of deforestation and biodiversity loss continue, increasing numbers of new lethal pathogens will afflict the planet.²²⁶ A fact AIIB has itself acknowledged - “megatrends...such as increased trade connectivity will allow the fast transmission of pathogens” - undermining its own argument.

17 FINAL LESSONS FROM THE FRONTIER

“Though we humans can give birth, the land cannot, if we chop down the forest what hope is there for our grandchildren.” Inei Yeq, Spiritual leader of Long Isun

To conclude, it is fitting to remain in East Kalimantan – the home of Indonesia’s next capital city – as an appropriate fable for what might await the island’s final forest frontier. Over the past 16 years, in the Eastern Province, oil palm plantations have increased from 117,000 hectares to 1.2 million hectares. In 2014, East Kalimantan’s Governor announced that “phase 2” for oil palm development in the region was to add an additional 1.4 million hectares over the next five years.²²⁷

Currently, there are 2.18 million hectares of land in the permitting and licensing process that most likely will be allocated to concessionaires.²²⁸ Large plantation companies are the primary beneficiaries. Their rights, by virtue of their permits, supersede any “unregistered rights” held by indigenous peoples who have already lost a substantial area of their traditional lands to these plantations. These rights remain unregistered precisely because of unmitigated and substantial obstacles in Indonesian law and practice and the delays in addressing these issues and resulting international legal responsibility fall squarely on the Indonesian state, aided and abetted by a plethora of companies that continue to take advantage of and benefit from gross human rights violations against xx million indigenous citizens of Indonesia.

In the indigenous Dayak Bahau Busaang village of Long Isun, the planned road would cut right through their ancestral territory, severing it in two. If this goes ahead before their land rights are secured it could have catastrophic consequences for the community for generations.

Within East Kalimantan lies the frontier District of Mahakam Ulu. The district sits at the centre of the HoB and has a population of only around 28,500 people, who belong almost exclusively to various indigenous Dayak peoples of these uplands. As of 2018, the border District now has 21,900 hectares of oil palm plantations, owned by 14 companies.²²⁹ The District has also delimited multiple, unallocated concessions, all of which overlap these remote communities’ lands.

In the same year, the Ministry of Public Works and Public Housing announced its plan to build 145 kilometres of road, which will connect timber concessions in Mahakam Ulu to the regional road network.²³⁰ The East Kalimantan government has said it intends to develop roads in the areas between Ujoh Bilang, the capital of Mahakam Ulu and the villages along the Malaysian border.²³¹ The District Head, Bonifasius Belawan Geh, added that “when the roads are finished, the development of plantations will easily follow ... [and,] plantation products can be sold to neighbouring countries using the Trans-Kalimantan highway.”²³²



Though we humans can give birth, the land cannot, if we chop down the forest what hope is there for our grandchildren.”

Inei Yeq, Spiritual leader of Long Isun

Companies are eagerly waiting for the completion of the roads to commence operations. Currently, oil palm companies operating in Mahakam Ulu use the river to transport their produce. Further infrastructure development predominantly serves to benefit these companies, at the expense of indigenous peoples, whose lands will be made available for oil palm expansion.

“Dayaks can’t be separated from the forest, our lives are spent in the forest. Without her we lose our identity”.
Inei Yeq

If we drill down to the community level, in the indigenous Dayak Bahau Busaang village of Long Isun, situated only a stone’s throw from the international border, the planned road would cut right through their ancestral territory, severing it in two. If this goes ahead before their land rights are secured it could have catastrophic consequences for the community for generations. This parable can be applied to thousands of other affected communities across Borneo’s unique borderlands. The vast majority of whom do not have effective protection for their territorial rights, especially as their right to effective participation and informed consent is routinely disregarded by the State.

“

“Dayaks can’t be separated from the forest, our lives are spent in the forest. Without her we lose our identity”.

Inei Yeq



Village elders join in a community meeting to discuss the Hudoq festival

18 RECOMMENDATIONS

ACTORS WITHIN THE HEART OF BORNEO (HOB)

- Conservation agencies working with the HoB should employ a **rights-based approach to conservation**, which provides that indigenous peoples and similarly land-connected communities (IPLC) have a right to collectively own and effectively control the lands and natural resources that they have traditionally occupied, possessed, used or acquired, including a right to restitution of lands from which they have been evicted or excluded in order to create protected areas for environmental conservation.
- Ensure respect for and protection of human rights is fully integrated into conservation management, strategy, programmes and training of all conservation agencies, donors and actors with the HoB.
- HoB funders should develop metrics and targets related to rights-affirming conservation, and provide funding to better support IPLC own initiatives for conservation. This means investing in processes of governance and collective leadership that engage communities to manage their territories in ways that reflect their priorities and worldviews.
- Donors and conservation agencies should put long-term recognition of customary tenure of IPLC as central to achieving their conservation outcomes.
- HoB should develop effective, adequately resources, and culturally appropriate complaints mechanisms that are available for IPLC to voice their concerns over the initiative as well as support initiatives for indigenous peoples' right to remedy in cases when conservation activities have negatively impacted their rights. Any mechanism must ensure adequate whistle-blower protections.
- Conservation agencies working within the HoB should oppose and avoid all conservation programmes that are inherently inconsistent with respect and protection for human rights. As part of due diligence, monitoring and compliance with indigenous peoples' rights should be present in all HoB project assessments, ensuring all information is transparent and accessible and evaluations are carried out by personnel with sufficient expertise.
- Conservation agencies operating in HoB should reorientate their work to support IPLC to conserve rather than displace and disempower them by supporting the current extractive and exploitative concession models employed by the States of Indonesia and Malaysia. This includes the withdrawal of support from industrial 'sustainable' forestry which have entailed the dispossession of indigenous peoples and local communities' lands, or restrictions on their access to or use their natural resources.

ACTORS WITHIN THE HEART OF BORNEO (HOB) (CONTINUED)

- Conservation agencies operating within the HoB should demand the national governments of Indonesia and Malaysia recognise and protect IPLC customary rights to lands.
- Conservation agencies operating within the HoB should carry out independent and thorough free prior and informed consent (FPIC) processes to ensure their programmes of work have the full support of all affected IPLC, and not rely on government actors to carry these out. Where possible, IPLC should be involved at the earliest stage and continually thereafter of all conservation programmes, including developing the project and implementation.
- Conservation agencies operating within the HoB should acknowledge and support the full protection of IPLC land and resource rights, including when these are not formally recognised by the government.
- Conservation agencies operating within the HoB should acknowledge IPLC as key actors in achieving conservation, and seek to support them in working to secure biodiversity, including through direct funding to better support IPLC own initiatives for conservation – in doing so, champion a community-led conservation model.
- Conservation agencies operating within the HoB should oppose the criminalisation of traditional farming and hunting practices of IPLC for sustenance purposes.
- Ensure there are avenues for redress for past and future actions in any human rights violations within conservation within the HoB. Conservation agencies should review their past and current involvement in supporting human rights violations – this includes the dispossession of IPLC customary lands or access and use of their natural resources – where this review identifies such violation steps should be taken to a) cease funding of any ongoing activity; b) publicly acknowledge the violation of rights and; c) consult with the affected peoples to determine the appropriate steps to remedy the violations.
- Conservation agencies operating within the HoB should help build the capacity of customary institutions and communities in their role as managers of conservation areas. To support indigenous community-based organisations, empowering and fuelling local conservation initiatives. To renew the focus on traditional forest management techniques, where the management of the forest is tailored to local needs and customs.

GOVERNMENT OF INDONESIA AND MALAYSIA

- Immediately suspend the expansion of oil palm or logging operations in the border region, and together with associated infrastructure development, until such time as they have recognised and secured indigenous peoples' possession and ownership rights over the lands encompassed by their customary tenure systems and obtained their free, prior and informed consent to proposed developments.
- Ensure that proposals for legislative and regulatory amendments do not weaken existing guarantees and are subject to consultation with indigenous peoples.
- Expediate the enactment of the Bill on the Recognition and Protection of the Rights of Indigenous Peoples, after securing indigenous peoples informed participation and consent thereto, and amending or enacting other relevant laws, including as pertains to non-discriminatory and effective judicial and other remedies that take into account indigenous characteristics (e.g., reflecting rights arising from customary tenure systems).
[Specific to Government of Indonesia]
- Immediately guaranteeing the effective enjoyment of indigenous peoples' right to collective legal personality and amends any law or regulation, whether national, provincial or district, that requires the prior certification of the existence of indigenous peoples, and recognizing that the fundamental criterion of self-identification, which shall absent objective criteria to the contrary and due process, be deemed by law to control the question of indigenous identity.
- Ensure that proposals for legislative and regulatory amendments do not weaken existing guarantees and are subject to consultation with indigenous peoples.
- Create an effective, streamlined, and time-bound procedure to recognise and protect indigenous peoples' land rights.
- Remedy the massive and ongoing rights violations occurring in existing oil palm plantations and impose stringent penalties, including the revocation of permits and concessions.
- Enforce regulations governing the permit allocation process to ensure they are transparent and free from manipulation and corruption.
- Implement the recommendations of the National Inquiries on Indigenous Peoples' Land Rights carried out by the national human rights commissions of both Malaysia and Indonesia that stress the urgent need for legal reforms to recognise and protect indigenous peoples' rights to their lands and territories, a conclusion also repeatedly reached by the UN's Committee on the Elimination of Racial Discrimination.
- Implement recommended reforms in the law to allow the collective titling of the lands and territories of the Orang Asli, Dayak and Pene\an (in Sarawak) and Kadazan-Dusun (in Sabah).
[Specific to Government of Malaysia]
- Revise the law on 'communal title', to close loopholes that are being misused to favour corporate takeovers of community lands without proper consultation and without securing consent from the affected communities.
[Specific to Government of Malaysia]
- Ratify ILO Convention 169 on Indigenous and Tribal Peoples.

BANKS AND EXTRACTIVE INDUSTRIES

- Banks and big business involved in the financing of, and exploitation of natural resources on the island of Borneo should publicly disclose the footprint of their global commodity supply chains, investments, or financial services impacting the island's forests and the rights of Indigenous Peoples and communities affected by logging and the expansion of industrial agriculture.
- Require proof of full compliance with laws, regulations, and with Free, Prior and Informed Consent (FPIC) processes for all areas under the management fund or control of the corporate group. Suppliers, investees and clients must fully demonstrate that the rights of affected Indigenous Peoples and local communities are being respected, especially their right to Free, Prior and Informed Consent to proposed and existing developments that affect them. This includes the conditioning of loans to their clients to meet strict environmental and social standard in line with international law and best practice.
- Establish robust forest and human rights monitoring and due diligence systems to identify expansion areas and impacted communities and rapidly respond to harmful activities linked to their sourcing, investments, or financial services in order to stop human rights violations and deforestation.
- Stop sourcing commodities from, investing in, or providing financial services to corporate groups that are complicit in human rights abuses and deforestation, or secure credible, time-bound commitments to ensure suppliers, investees and clients transparently implement corrective actions and remedy negative impacts.
- Enact zero tolerance procedures within supply chains, investments and/or financing portfolios to prevent violence, criminalization, intimidation, and killing of human rights, land, and environmental defenders.
- Advocate for enabling laws and regulations in producer and consumer countries that address the underlying causes of violations of indigenous rights, and require companies to ensure their supply chains, investments and financial services do not have adverse environmental and social impacts.

CERTIFICATION SCHEMES (SUCH AS RSPO AND FSC)

- Restore the credibility of certification schemes by making the audit process more robust, for example, by establishing independent peer reviews for draft audits before the certification decision is made.
- Increase indigenous representation in certification scheme's governance structure, through the establishment of a permanent Indigenous Peoples committee/advisory body/forum to facilitate direct liaison with the certification organisation's board.
- Create a bond mechanism to hold certified companies accountable for any environmental and socio-cultural damages, including human rights violations, they cause affecting on indigenous peoples and their traditional territories, even when these companies cease to be certified – we recommend a bond system as a means of ensuring remedy whereby the bond would act as an agreement between the certificate holder [and the certification program] to uphold the standard's principles, and to provide remedy to a third party in circumstances where these are violated.
- Provide more independent and transparent audit processes to break the 'clientelist' links between certification bodies and the companies they audit, this could be facilitated through an ESCROW trust fund which reports direct to the certification schemes.
- Provide auditors with locally-specific cultural awareness training to support improved and culturally-appropriate participation of indigenous peoples in data collection for assurance.
- Provide greater transparency of auditors credentials and history.

INFRASTRUCTURE MEGA-PROJECTS (INCLUDING THE TRANS-KALIMANTAN AND PAN BORNEO ROAD NETWORK)

- Guarantee the affected IPLC have a right to give or withhold their free, prior and informed consent for any proposed projects which may impact their traditional territories and natural resources.
- Enhance information disclosure, consultation, participation and accountability in infrastructure projects, including appropriate grievance redress mechanisms. These mechanisms should be aligned with the Principle 31 of the UN Guiding Principles which advocates for a mechanism which is “legitimate, accessible, predictable, equitable, transparent, and rights-respecting”.
- Require trilateral spatial planning across the HoB to reduce the impact on indigenous communities by proposed road-building plans.
- Such project should require rigorous transparent social and environmental assessments for road-building that considers the full range of their likely costs and benefits.
- Guarantee that participating States should ensure the active and meaningful participation of IPLC, whereby free and prior availability of project information in accessible languages and culturally-appropriate formats is provided to affected rights-holders from the initiation of the project lifecycle.
- Ensure project selection and design are consistent with international human rights and the host country’s environmental commitments.
- Ensure that all relevant public and private actors involved in the infrastructure project carry out human rights due diligence (HRDD). This process should be ongoing throughout the project life-cycle.

INTERNATIONAL DEVELOPMENT FINANCIAL INSTITUTIONS (SPECIFICALLY AIBB AND ADB)

- Integrate a requirement to respect international human rights and environmental law in their safeguard and sustainability policies, including the right for indigenous peoples to give or withhold their free prior and informed consent, as well as a requirement for human rights due diligence throughout the project lifecycle. Similarly, institutions should employ policies to help protect human rights defenders from intimidation and criminalisation.
- Address the human rights and environmental risks associated with the effort to attract private investment in infrastructure through their sustainability policies.
- Address discrimination as the earliest phase of a project lifecycle and should be closely monitored throughout the project lifecycle.
- Address the serious lack of data on the distributional impacts of mega-infrastructure projects on indigenous populations, special attention should be paid to those who are excluded from social or political life deliberately, and those experiencing discrimination on multiple grounds – such as gender and ethnicity.
- Provide public information policies that include full, proactive disclosure of information on how supported projects may affect IPLC, this should be provided in accessible languages and culturally-appropriate formats.

ANNEX I: A CHRONOLOGY OF LEGISLATION IN INDONESIA THAT ERODE INDIGENOUS PEOPLES' RIGHTS

1870: **Dutch Agrarian Land Law** (*Agrarische Wet*) stipulates that all uncultivated or wasteland is state property that can be leased out to companies for plantation development on a long-term basis. All lands which have no legal owner, are now 'domain' lands owned by the colonial state.

1945: Indonesian Constitution, article 33(3) gives the State the right to control natural resources.

1960: *Agrarische Wet* is incorporated into legislation through the **Basic Agrarian Law (No.5/1960 or BAL)** enabling the alienation of land in the national interest. While recognising that customary law (*adat*) and adat land rights (*hak ulayat*) still existed, the law subordinated them to state law. This was the first national law on land to be enacted after independence and remains the framing law on land to this day. The combination of the Constitution and BAL reintroduced the concept of State 'domain', now lands were to be entrusted to the new socialist republic, instead of the colonial state.

1967: The New Order's **Basic Forestry law (No.5/1967 or BFL)** radically redefined the property rights of roughly 75% of all Indonesian's land surface. BFL classified Indonesia's forests as state-owned, brushing aside indigenous communities' ownership claims. Forest peoples claiming adat rights, such as hak ulayat, find their lands are now subsumed by State forest areas (*kawasan hutan Negara*), where no property rights are recognised. Adat rights are explicitly subordinated to 'the national interest'. Similarly, the Suharto government's **Mining law (No.11/1967)** obliged all rights-holders to allow mining activities on their land with no single reference to the specific rights of adat communities.

1971: **BFL Implementing regulation No.21/1971** Article 6(1) stipulates: "the rights of *adat* law communities and their members to extract forest products... shall be arranged in a proper manner so as not to interfere with the implementation of forest utilisation'.

1974: **Presidential Decree No.45/1974** - *adat* rituals and traditions were prohibited and traditional shifting cultivation practices banned.

1979: **Law on Village administration** (No.5/1979) subordinated all villages to a single common bureaucratic structure. Customary institutions were totally replaced by an administrative system.¹

1984/1989: **Minister of Home Affairs Regulation (No.11/1984); Instruction No.17/1989 concerning Development and Assistance to Customary Law Communities in the Regions** instructed Provincial governors and District heads to restructure customary institutions, further undermining the authority of traditional leaders and emasculating customary institutions.

1. Villages were often regrouped to be run by a village head (*kepala desa*) who was placed under control of the head (*camat*) of the sub-district (*kecamatan*), in turn appointed by the head (*bupati*) of each district.

1994: Minister of Social Affairs Decree No.5/1994 - 2.5 million people identified as ‘isolated and alien peoples’ (*Masyarakat terasing*), a million of whom were still thought to require State intervention, including involuntary resettlement.

1999: New Basic Forestry Law (No.41/1999) – a revision of 1967 law – prioritised the allocation of exploitation rights to concessionaires for logging and plantation schemes. Although ‘customary forests’ (*hutan adat*) are mentioned for the first time, these were defined as State forests, which in turn are defined as ‘forests with no rights attached’. The government is given far-reaching powers to control timber extraction in Production Forests, and the Minister of Forestry is given power to grant all commercial timber utilization permits.

2002: Ministerial Decree on Operational Guidelines for the empowerment of Remote Communities governed by Custom. Resettlement of indigenous peoples, such as those living in ‘protection forest and border areas’, is still sanctioned. Remote communities with ‘orientation towards traditions [and] customs’ are seen [as] an obstacle [to] the development process itself’.

2004: Law on Plantations (No. 18/2004) spelt out the limited circumstances in which *adat* may be formally acknowledged.² It became the responsibility of the company, not the district government, to obtain agreement with landowners over the surrender of their lands. The unequal power relations between plantations and indigenous communities was inevitably one sided. The law permitted plantations to use the local ‘security apparatus’ to maintain security of the estates, with several articles listing punishments if there was seen to be any threat to the plantation. **Law on Regional Autonomy (No.32/2004)** further restricts community self-governance, where village representatives act as civil servants annulling the authority of customary institutions.

2005: Presidential regulation on land procurement for the implementation of Development for the public Interest (No.42/2005) - the government could force the release of land, when this is in the public interest. This considerably limits property rights and customary rights. Despite revisions to the regulation (**Presidential Regulation No.71/2012**) and its subsequent amendments³, a whole plethora of government institutions continue to have the power to execute the revocation of land rights and own and administer any procured land.

2009: Regulation on Reduction of Emissions from Deforestation and Forest Degradation Procedures (No.30/2009) allows the State to create a massive system of publicly- and privately-held forestry concessions and ‘carbon sinks’ in the forests traditionally owned by indigenous peoples without any regard for their rights and existence. **Law on Mineral and Coal Mining (No.4/2009)** fails to recognise indigenous people’s land rights, where as long as the issued mining permits are in line with district and provincial spatial planning there is no obligation ‘to protect, respect and fulfil people’s concerns in which their area is under a mining area and its affected area’, contrary to 1945 Constitution. Status of the verification scheme in the **Timber Legality Assurance System (SVLK)** becomes mandatory. SVLK does not address the failure of the ministry of Forestry to determine which forests are burdened with pre-existing rights. The state can thus, continue to expropriate and licence industrial exploitation of community forest without community consent or compensation.

2011: Master Plan for the Acceleration and Expansion of Indonesia’s Economy 2011-2025 (Presidential Regulation No.32/2011) specifically highlights the role of palm oil and timber in provincial development facilitated through mega-infrastructure projects.

2. *There had to be: clear designation of leaders in the community; strict boundaries designating adat land; a functioning system based on traditional justice and laws; and acknowledgment by the state of such a system through regional legislation.*

3. *Presidential Regulation No.40/2014; No.99/2014; No.30/2015; and No.148/2015*

2013: **Law on the prevention and eradication of Forest Destruction (No.18/2013)**, article 50(3) outlines criminal penalties for communities who enter forests designated as a ‘protected’ or ‘conservation’ area without prior permission from the authorities, threatening the lives of indigenous peoples who rely on non-timber forest products for their livelihoods.

2014: **Law on plantations (No. 39/2014)** prohibits the licencing of permits on customary lands but crucially stipulates nothing about indigenous peoples right to withhold their Free Prior and Informed Consent (FPIC) to concessions that have already been handed out over their lands⁴. It also reintroduces articles criminalising communities who occupy plantation lands or use traditional practices to open up forest areas. **Law on Regional Governance (No.23/2014)** withdraws the authority over natural resource management from district governments and shifts this to provincial and/or national governments reverting to a ‘New Order’ style of forest management.

2016: **Presidential Regulation No. 45/2016** details Indonesian national mid-term development agenda (2015-2019) with renewed focus on escalating agri-business investment, accommodating and further facilitating the interests of large scale and private concession-based development over indigenous rights recognition.

2017: A series of Presidential Regulations (**No.56/2017** and **No.88/2017**) stipulate that the government will handle the social impacts on communities impacted by national strategic projects (including involuntary resettlement). The resolution of land conflicts will now be carried out by relocating the community unless they can demonstrate they have inhabited the area well before its inauguration as a forest area. Furthermore, these regulations end the possibility of hutan adat in ‘conservation forest’, threatening the lives of thousands of indigenous communities whose territories are located in conservation areas. The recognition of *adat* communities must now be achieved through local regulations – a time-consuming and opaque process – all the while its legal standing/application still remains very unclear and largely subject to government interpretations.

2020: The ‘**Omnibus Bill**’ [in process] proposes over 1,200 amendments to at least 80 existing laws. New deregulation laws **scrap** (1) plasma obligations whereby oil palm firms previously had to allocate 20% of their land for smallholder farmers²³⁴ (removing safeguards for communities to benefit from oil palm development); (2) obligations for firms to use concessions in strict time frames, or risk having land deemed abandoned - speculators can now stockpile huge tracts of land they have no intent to immediately use, threatening indigenous efforts to secure rights to their customary forests; (3) Environmental and Social impact assessments – bypassing public consultations; (4) requirements for all regions to maintain a minimum of 30% of their territory as forest area. Revision of **2009 Mining law** removes limit of the size of mining operations under a single permit and allows the automatic renewal of permits before required rehabilitation has been carried out.

4. *Law No. 39 of 2014 on Plantations (Law of Plantations) art. 12(1) “In the event that the land needed for a Plantation Business is [owned by] Customary Law Communities, the Plantation Businessperson must conduct deliberations with the Customary Law Community holders of Ulayat rights to obtain approval regarding the surrender of Land and compensation.”*

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