

Sarawak, Malaysia

**Infringement of the Rights of
Indigenous People by Continuous
Illegal Logging Practices**



Logged mountains (Ulu Kapit, Sarawak, Sep. 2015)

Human Rights Now



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I. Introduction

1. Overview of the Research Report

This research report elucidates the reality of the illegal logging of rainforests in Sarawak, Malaysia's largest state, and the infringement of rights of indigenous inhabitants caused by it, as well as calls for effective countermeasures by logging companies in Sarawak, the Sarawak State Government, Japanese companies, and all other stakeholders of illegal logging including the Japanese Government to end illegal logging.

A) Infringement on the Rights of Indigenous Peoples by Illegal Logging in Sarawak and Responses by the Malaysian Government

The indigenous inhabitants of Sarawak have long depended on forests to support their livelihoods in accordance with traditional laws and customs. The land rights of these indigenous peoples are legally recognized under the Malaysian constitution, which define the rights as native customary rights ("NCR"). The Sarawak state and Malaysian logging companies have depleted Sarawak's once abundant natural rainforests, impinging greatly on the lifestyles of the native populations that have lived in the forests for centuries.

In Sarawak, deforestation is regulated by the Malaysian government's licensing system, and NCR should be protected under this licensing system. However, due to corruption and the collusive relationships between local logging companies and the state government, licenses for logging projects have been issued arbitrarily, and many of these licenses have gone to projects with complete disregard for NCR. In addition, even in cases where NCR is actually infringed upon, governmental regulation is significantly inadequate because of corruption and a lack of resources at the state government level.

In order to address the situation, the Human Rights Commission of Malaysia (SUHAKAM) conducted field surveys and revealed, in a 2013 report, that NCR has not been properly recognized in legal terms, and that therefore many licenses for logging and forest development projects have been granted despite violation of NCR. According to a news release, the Malaysian government set up a task force to analyze the 2013 report and accepted the task force's recommendations to obtain preliminary consent from indigenous peoples; however, the situation remains critical and it remains to be seen that reforms will be truly made for the sake of the indigenous peoples.

B) The Facilitation of Illegal Logging due to Lenient Japanese Regulations

Japan is a major importer of Sarawak timber and wood products, and various wood products made from illegally logged timber are widely used in Japan. Japan's lenient restrictions against illegally logged timber can be pointed to as the true source of this influx. While Japanese legal restrictions on the importation of illegal timber do exist in the form of the Green Purchasing Law and other guidelines published by the Forestry Agency, there are no laws or regulations banning private sector actors from importing illegally logged timber, nor are there laws or regulations providing for the criminal punishment of private importers of illegal timber. Although the "Goho-Wood System", created based on Forestry Agency guidelines, is a voluntary initiative for private actors, it is ineffective in stopping illegal logging. This is because there exist loopholes, such as approval documents issued by the state of Sarawak being accepted as proof of timber legality, despite the identification of the Sarawak government's collusive relationships with logging companies. The leniency of Japanese regulations and the

reliance of Japanese importers on them are worsening the situation in Sarawak.

Based on the facts above, Human Rights Now (HRN) calls for an immediate cessation of illegal logging by local logging companies, and also demands that Japanese importers implement an immediate suspension of imports from companies logging illegally.

Additionally, HRN asks that the Malaysian government amend its laws and improve its legal practices in order to protect NCR in accordance with the proposal by SUHAKAM, and that the Japanese Government prohibit the import of illegal timber and impose criminal punishment on offenders. (See VII. "Proposal" for more details about our proposal.)

2. Composition of the Report

This report consists of the following sections.

Section II provides an overview of the structure and effects of illegal logging in Sarawak. It focuses on five stakeholders of illegal logging: 1) indigenous peoples, 2) local logging companies, 3) the Sarawak state government, 4) Japanese companies, and 5) the Japanese government, examining how they are involved in and affected by illegal logging.

Section III analyzes the causes of illegal logging. It specifically looks at the licensing system in relation to logging and the legal status of NCR in order to depict the extent to which NCR has been violated by illegal logging in Sarawak. It also explains how laws and regulations restricting illegal logging are not being properly administered, as well as the role of corruption enabled by the collusive relationship between the state government and the local companies in bringing about the current situation.

Section IV examines infringement upon NCR and the resulting destruction of the livelihood of indigenous peoples.

Section V focuses on a report published by SUHAKAM regarding Malaysian domestic laws governing the land rights of indigenous peoples, including common law. It also looks at international human rights standards on the land rights of indigenous peoples.

Section VI discusses the situation in Japan, the largest importer of Sarawak timber, and its use of illegally-logged timber. It demonstrates how the regulation of illegally logged timber in Japan is lenient compared to US, EU and Australian regulations, and that because of that leniency, the wide-spread usage of illegally logged timber in Japan is overlooked and tolerated.

Finally, Section VII offers recommendations that local companies, Japanese companies, the Japanese Government, Malaysian and Sarawak Government should implement in order to end illegal logging and ensure that indigenous people properly enjoy NCR.

3. Research Methodology

This report was drafted based on the results of an investigation conducted by HRN researchers on Japanese, Malaysian, and international laws related to illegal logging, surveys of staff at NGOs working to prevent illegal logging, and interviews with indigenous people and local stakeholders conducted while they were visiting Japan. For Section VI.1 (Usage of illegally logged Sarawak timber in Japan) HRN made inquiries to the Japanese

companies mentioned in this report and the section reflects their responses. HRN did not conduct a field survey in Malaysia as the focus of this report is on presenting the problems of the Malaysian and Japanese legal systems which enable illegal logging.

II. Background

1. Illegal Logging and Its Effects

Sarawak, one of two Malaysian states on the island of Borneo, has long suffered from excessive deforestation, and its once abundant forests have been significantly depleted.

[Map of Sarawak]



Comparison of maps of forest area in Sarawak from 1960 and 2010, shows a clear and major reduction in forest area. (See the maps on the next page.)



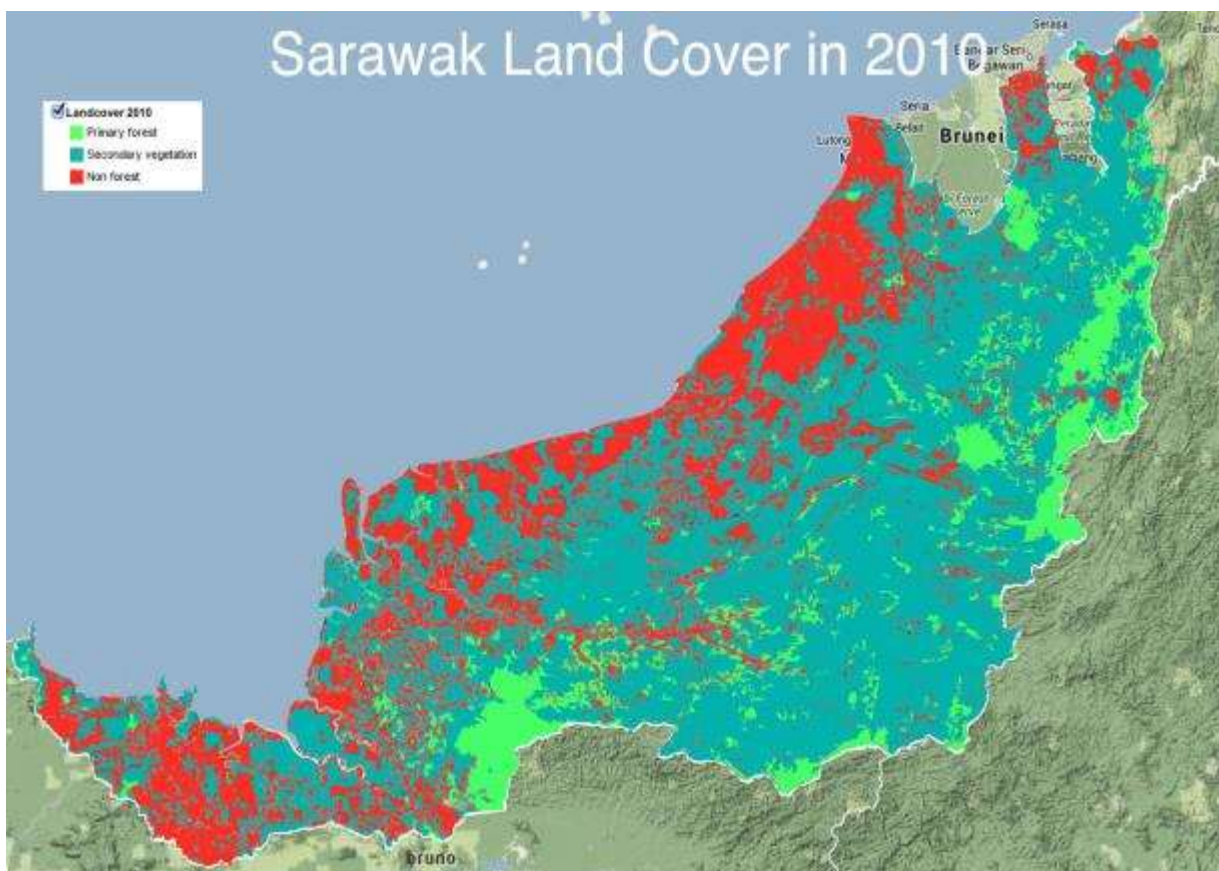
Deforestation in progress (2007)

(1) Map of forest area in Sarawak in 1960 (Green and blue zones are forest areas.)



Source: Bruno Manser Fund <http://news.mongabay.com/2014/02/new-forest-map-for-sarawak-reveals-large-scale-deforestation-encroachment-on-indigenous-territories/>

(2) Map of forest area in Sarawak in 2010 (Red zones are deforested areas)



Source: Bruno Manser Fund <http://news.mongabay.com/2014/02/new-forest-map-for-sarawak-reveals-large-scale-deforestation-encroachment-on-indigenous-territories/>

The excessive deforestation has continued up to the present day: although Sarawak is home to only 0.5% of the world's tropical forests, it accounted for 25% of the world's tropical timber exports in 2010¹; due to rampant and excessive logging, deforestation in Sarawak continued at a pace of around 2% annually during the period between 2006 and 2010²; and The report published in 2013 by Global Witness, an international environmental NGO, estimated that only 5% of Sarawak's original forests remain intact.³

2. The Mechanisms of Illegal Logging

Excessive logging stems from the Sarawak government's reckless issuance of licensing for logging in violation of NCR, logging companies' logging in violation of forests laws and the conditions on licenses granted to them, and the fact that violators of these laws and regulations are not held accountable for their actions.

In order to log a forest in Sarawak, an entity has to receive a license issued under the government's jurisdiction; upon receipt of this license, the logging is recognized as a legal action under Malaysian law. In many cases, the courts have held that when a logging license infringes on NCR, the granting of such licenses is illegal.

However, until recent times, the Sarawak government continued to issue licenses under a narrower interpretation of the definition of NCR than that of the courts; thus, the state, together with logging companies, have been infringing upon indigenous peoples' NCR.

Moreover, logging companies in Sarawak have been reported to be engaged in numerous illegal logging activities in violation of Sarawak laws and regulations regarding forests and the conditions of their timber licenses. Specifically, these activities include logging outside of concession areas, logging in protected areas named as candidates for inclusion in national parks that had thus been officially excluded from concession areas, and logging in a on, ace-deforested area without completing an environmental impact assessment.

Much of this illegally logged timber is imported to Japan through trading companies, but Japanese companies do not pay adequate attention to the legality of the logging process in the supply chain and resource sustainability before import. The Japanese government has not taken appropriate measures to prevent the importation of illegal timber, and as a result is actually encouraging the import of illegal timber.

3. Stakeholders

This section considers the following stakeholders: 1) Indigenous peoples in Sarawak, 2) Local logging companies, 3) the Sarawak state government, 4) Japanese companies, and 5) the Japanese government.

① Indigenous peoples in Sarawak

Sarawak has a population of about 2.5 million, making Sarawak the least densely populated state in Malaysia.⁴ The Federal Constitution of Malaysia recognizes a total of twenty-six ethnic groups, including Iban,

1 'Global Witness: In the future, there will be no forests left' Nov 1, URL: <https://www.globalwitness.org/archive/hsbc/>, 6.

2 'Impact of oil palm plantations on peatland conversion in Sarawak 2005-2010,' Sar Vision, Jan 25, 2011, URL: <http://www.wetlands.org/Portals/0/publications/Report/Malaysia%20Sarvision.pdf>, 11.

3 "An Industry Unchecked: Japan's extensive business with companies involved in illegal and destructive logging in the last rainforests of Malaysia", Global Witness, Sept. 2013,

URL: www.globalwitness.org/sites/default/files/library/japan-sarawak-report-final-lo-res_2.pdf

4 Population Distribution and Basic Demographic Characteristic Report 2010 (Updated: 05/08/2011), Department of Statistics,

Penan and Kelabit, as Sarawak's indigenous people.⁵ The low population density is characteristic of the traditional ways of life that the indigenous groups in Sarawak have maintained for generations, whereby they live off of and depend on the land and its forests. The following are examples of indigenous peoples' ways of life.⁶

The Iban

The Iban people dwell as entire communities in longhouses situated on the banks of rivers and tributaries. These traditional longhouses and their adjacent areas are called *pemakai menoa*, literally meaning "land to eat from," which include everything within a given boundary. Each Iban group's *pemakai menoa* includes the adjacent farming land, cultivated land, cemetery, and, most importantly, the surrounding forest area within a half day's walk, which they rely on for gathering produce, water, hunting, and cultural practices such as honoring distinguished tribe members.

The Kelabit

The Kelabit people need protection for the immediate land they live on, as well as the land around them, since their way of life also depends on the resources from surrounding forests. Similar to the Iban's *pemakai menoa*, their traditional territory includes agricultural farm land, burial grounds which are situated in caves, and the adjacent forests for hunting, fishing, gathering, and cultivation. This surrounding forest land is thus crucial to the survival of Kelabit people.

The Penan

The Penan people were traditionally nomadic hunter-gatherers known for their highly egalitarian society and for their respect for the land. Most of the Penan have now settled into agricultural lifestyles in longhouse communities that bear much similarity to those of the Iban and Kelabit peoples. However, all Penan, nomadic or not, continue to rely heavily on the forests' resources and continue to practice *molong*, a highly sustainable means of utilizing the Earth's resources.

As shown above, these indigenous peoples live according to traditional laws and customs, relying on the land as the means for maintaining their livelihoods. However, decades of logging practices have continued with disregard for the customs of indigenous peoples, depriving them of the basis of their livelihoods and severely affecting the sustainability of their livelihood and ultimately, their survival.

② Local logging companies

Six major logging corporate groups dominate the timber industry in Sarawak.⁷ (Company names are in no

Malaysia, URL:

http://www.statistics.gov.my/index.php?r=column/cthemByCat&cat=117&bul_id=MDMxdHZjWTK1SjFzTzNkRXYzcVZjd09&menu_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09

5 Federal Constitution of Malaysia, Article 161(A), subsection 7.

6 Ramy Bulan and Amy Locklear, 'Legal Perspectives on Native Customary Land Rights in Sarawak,' SUHAKAM, 2008, URL: <http://www.suhakam.org.my/wp-content/uploads/2013/12/Legal-Perspectives.pdf>, 34-35, 38-39, 41-43.

7 'Development of Global Timber Tycoons in Sarawak, East Malaysia,' Bruno Manser Fonds, February 2011, URL: http://stop-timber-corruption.org/resources/bmf_report_sarawak_timber_tycoons.pdf, 31-32.

particular order)

【The six major logging corporate groups】

- Samling Group
- Rimbunan Hijau Group
- WTK Group
- Ta Ann Group
- KTS Group
- Shin Yang Group

These groups have close relationships with the Sarawak government.⁸ In some cases, family members of group founders possess positions in parliament, and in others, government officials are also shareholders and/or board members of the logging companies. The majority of logging licenses have been granted to these groups,⁹ and nowadays these groups have become dominate players not only in the timber industry but also in many other important industries in Sarawak, including oil palm plantation, construction, and property development.¹⁰

In addition, royalties from logging are said to be the largest source of revenue for the Sarawak government.¹¹ In short, the logging corporate groups and the Sarawak government share common conflicts of interest, having gained gargantuan amounts of profits through the excessive logging and destruction of forests.

③ The Sarawak government

The Sarawak government has neglected its indigenous peoples and has instead chosen to coddle a rapidly expanding logging industry. The government has ignored any NCR to the land possessed by the indigenous peoples, illegally granted logging licenses to logging companies, and permitted the deforestation of indigenous land.

④ Japanese companies

The major Japanese importers of timber include the Sojitz Corporation, Itochu Corporation, Sumitomo Forestry Co., Sumisho & Mitsuibussan Kenzai Co., Marubeni Building Materials Corporation, Toyo Materia Corporation, Japan Kenzai Co., and their subsidiaries, while large construction companies such as Shimizu Corporation, Kajima Corporation, and Taisei Corporation use illegally logged timber in their construction projects. (Company names are in no particular order.)

⑤ The Japanese government

Japan has decided to implement measures according to which public sectors only procure legally verified

8 Id, 65.

9 Id, 32.

10 Id, 64.

11 Id, 23-24.

wood under its public procurement law, the Green Purchasing Law (GPL), which states that the nation shall endeavor to procure eco-friendly goods and services.¹² A guideline developed by the Japanese Forestry Agency in 2006, created in accordance with the GPL, set forth a number of verification methods to determine the legality of imported timber.

However, ongoing imports of illegally logged timber continue even under the GPL due to its vague definition of “legality” and the lack of criminal punishment against offenders.

Please see Section VI.2 (Japanese Regulations) for more information about the verification system based on the GPL and Forestry Agency guidelines, and its corresponding problems.

¹² The official name of the law is Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities (Act on Promoting Green Purchasing), Act no. 100 of 2000.

III. What is Behind Illegal Logging?

One reason why illegal logging has continued in Sarawak is that the execution of regulation, licensing, and management of the forest and forest industry sector in Malaysia is not effective. In Malaysia, a logging license, a manufacturing license, or an export/import license issued by the Forest Department of Sarawak is required to conduct logging, timber processing, or export/import respectively. Indigenous peoples' rights are supposed to be protected under this licensing system, which in theory should limit illegal logging.

However, because the Sarawak state government's actions against illegal logging are extremely inadequate, and due to corruption and the collusive relationship between large logging companies and the state government, logging licenses have been handed out in violation of the indigenous peoples' rights. The protection of indigenous peoples' rights under the current licensing system is significantly inadequate.

1. Obtaining a License

Forest resources in Sarawak are administered by various government agencies and government-affiliated organizations. The following four organizations are the main institutions associated with the licensing system.

- Ministry of Resource Planning and Environment
- Forest Department of Sarawak
- Sarawak Forestry Corporation (SFC)
- Sarawak Timber Industry Development Corporation (STIDC)

The Ministry of Resource Planning and Environment is in charge of overall governance,¹³ under which is the Forest Department of Sarawak which issues logging licenses,¹⁴ the Sarawak Forestry Corporation (SFC) which manages logging after the issuance of licenses,¹⁵ and the Sarawak Timber Industry Development Corporation (STIDC) which is in charge of the registration of manufacturing timber products and other matters¹⁶ and the issuance of export/import licenses.¹⁷

A) Logging Licenses

A logging license issued by the Forest Department of Sarawak is required to conduct logging in Sarawak.¹⁸ Each logging license covers a specific concession area.¹⁹ Sarawak typically issues logging licenses valid for a five

13 'Functions of Ministry,' Ministry of Resource Planning and Environment, retrieved on December 25, 2015, URL:

http://www.kpps.sarawak.gov.my/modules/web/pages.php?lang=en&mod=webpage&sub=page&id=45&menu_id=0&sub_id=67

14 'Functions of Forest Department,' Forest Department Sarawak, retrieved on December 25, 2015, URL:

http://www.forestry.sarawak.gov.my/modules/web/pages.php?mod=webpage&sub=page&id=1104&menu_id=0&sub_id=99

15 'Sustainable Forest Management,' Sarawak Forestry Corporation, retrieved on December 25, 2015, URL:

<http://www.sarawakforestry.com/htm/sustainable.html>

16 'General Information,' Sarawak Timber Industry Development Corporation, retrieved on December 25, 2015, URL:

<http://www.sarawaktimber.gov.my/pages.php?mod=webpage&sub=page&id=78>

17 'Issuance of Export & Import License Through ePermit System,' Sarawak Timber Industry Development Corporation, retrieved

on July 28, 2015, URL: <http://www.sarawaktimber.gov.my/modules/web/pages.php?mod=webpage&sub=page&id=129>

18 Forests Ordinance 1958 (Cap. 126) of Sarawak, URL:

http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf, § 51(1), and Forests Bill, 2015, §40(1).

19 Council on Ethics, The Norwegian Government Pension Fund Global, To the Ministry of Finance, Recommendation of 22 February 2010, URL: https://www.regjeringen.no/globalassets/upload/fin/etikk/recommendation_samling.pdf, 9.

or ten year duration, subject to renewal.²⁰ Companies applying for logging licenses must submit a plan document which includes the following information.²¹

- Forest Management Plan
- Species to be cut
- Minimum diameter cutting limits
- Annual allowable harvest areas
- Maximum volume of harvest
- Road construction, and other necessary actions that a company must take in order to comply with relevant laws

Once the license is issued, in order to obtain a Permit to Enter Coupe the licensee must submit a General Harvesting Plan (detailing the harvesting block layout and road network for the entire concession) to the Sarawak Forestry Corporation (SFC) prior to any logging activity.²²

Moreover, Harvesting Plans for each concession must be developed and approved annually in order for the company to comply with SFC regulations.²³

The Harvesting Plans must show the company's harvesting block layout, harvesting methods to be used, road network and conservation areas, critical resources, and important sites.²⁴

B) Manufacturing Licenses and Registration with STIDC (Necessary to Engage in Timber Industry Activity)

A company engaging in timber processing is required to obtain a manufacturing license from the Ministry of International Trade and Industry (MITI) of the Federal Government of Malaysia, which is necessary for any manufacturing activity in any industry.²⁵ In addition, companies are required to register with the Sarawak Timber Industry Development Corporation (STIDC).²⁶

The Sarawak Timber Industry Development Corporation Ordinance of 1973 (ORD. NO. 3 OF 1973) confers authority to the STIDC to regulate and manage the production, sale, distribution, and marketing of timber and timber products, together with regulation of manufacturing standards, quality, and the trade practices of the Sarawak timber industry.²⁷ The ordinance also states that, "No person shall establish, manage, or operate any plant, factory, or premises for carrying on any timber industry unless he is registered with the [STIDC]",²⁸ and

20 Satem, the Chief Minister of Sarawak mentioned in Aug. 2014 that he was willing to extend the license term to 60 years for operators who obtained forest certificate. Alison Hoare, 'Illegal Logging and Related Trade: The Response in Malaysia,' Chatham House, January 25, 2015, URL: http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150121IllegalLoggingMalaysiaHoare.pdf, 16.

21 Council on Ethics (supra, note 18), 9.

22 Id.

23 Id.

24 Id.

25 Industrial Co-ordination Act 1975 of Malaysia, URL: <http://www.agc.gov.my/Akta/Vol.%204/Act%20156.pdf>, § 3(1).

26 Sarawak Timber Industry Development Corporation Ordinance, 1973 (Ord. No. 3 of 1973), URL: http://sarawaktimber.org.my/doc/STIDC_Ordinance_1973.pdf, § 5A(1).

27 Sarawak Timber Industry Development Corporation Ordinance, 1973 (ORD. NO. 3 OF 1973).

28 Id.

that any company which does not register with the STIDC will be fined RM 300,000.²⁹

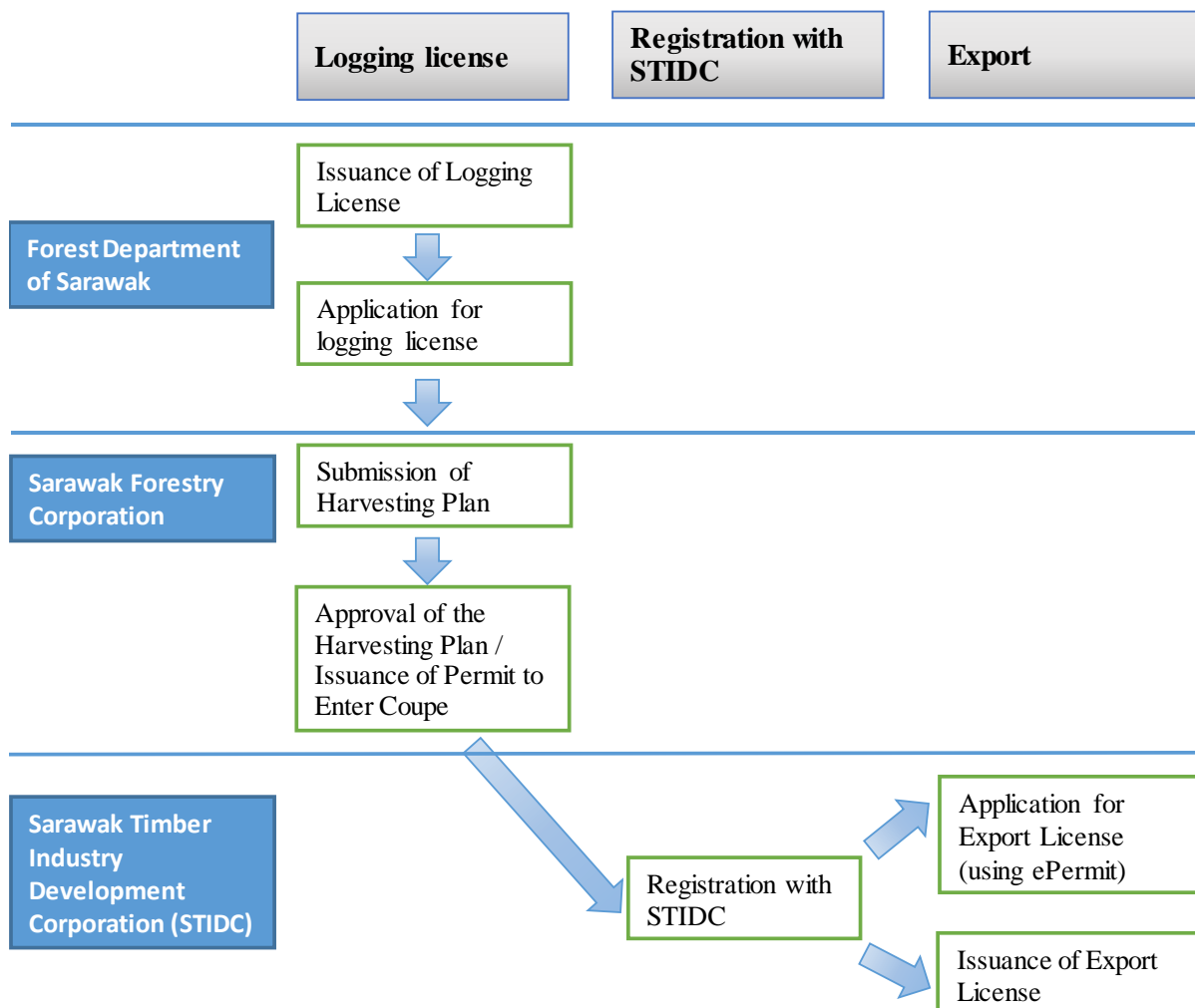
C) Export/Import Licenses³⁰

Exporters and importers of timber are required to obtain an export/import license. The STIDC issues export and import licenses. According to the STIDC website, an electronic permit issuance permit system (ePermit) known as *Sistem Maklumat Kastam* has been utilized since January 2009.

Exporters and importers of timber must first register with STIDC and then, in order to receive a company trading number, with the Royal Customs Department.

The company must then register as an ePermit system user with Dagnangnet Technologies Sdn Bhd, the operator of the system. The electronic system was created to increase efficiency and transparency within the timber industry, while simultaneously minimizing the permit process.

【Overview of The Licensing System】



²⁹ Id.

³⁰ 'Issuance of Export & Import License Through ePermit System,' Sarawak Timber Industry Development Corporation (STIDC), retrieved June 29, 2015, URL: <http://www.sarawaktimber.gov.my/modules/web/pages.php?mod=webpage&sub=page&id=129>

2. Breakdowns in the Operation of Law and Lack of an Enforcement System

Under the regulations in Sarawak, serious noncompliance with requirements such as logging outside concession areas can justify the revocation of a logging license or affect the decision to renew a license,³¹ but this practice rarely occurs. Interviews with current and former employees of the Forestry Department of Sarawak revealed that it is rare or unheard of for the Sarawak Forest Department to revoke or fail to renew a logging license due to infractions of the legislation.³²

Former Sarawak State Attorney-General J.C. Fong criticized the insufficient control of illegal logging in 2009,³³ noting that:

[T]he State suffers economic loss through illegal logging, unlawful occupation of State land and false land claims.... [T]he State government's enforcement unit does not have the manpower, and logistical and intelligence procurement ability of the police.³⁴

Logged timber is transported to the Forest Checking Station to be investigated by government officials in the Sarawak Forestry Corporation.³⁵ However, the physical tracking of timber does not go so far as to link logs to their stumps, and government officials are not regularly involved in inspecting the timber until it arrives at the Forest Checking Station, which can be up to 400 km away from the felling point.³⁶ Moreover, it is said that STIDC issues export/import licenses without verifying that the mills in question only process legally supplied logs.³⁷

Poor enforcement and monitoring logging and shipping practices has led to persistent illegal logging including logging outside of concession areas, thus contributing to environmental degradation and the seizure of indigenous peoples' lands throughout Sarawak.

Contributing to the situation as much as illegal logging outside of concession areas, the Sarawak government has until recently continued to issue logging licenses in violation of the NCR established by common law.

The government does not conduct prior consultation with indigenous peoples, nor does it give them notice prior to a granting a logging license.³⁸ Neither is legal recognition given to many NCR, as discussed in **Section V.1.B. (Sarawak Land Code 1958)**. These systematic factors are behind the issuance of logging licenses in violation of NCR.

3. Government Corruption

This insufficiency in protection of indigenous people's land rights is caused by corruption within the Sarawak government, stemming from the 1980s. According to Global Witness, Abdul Taib Mahmud, former Chief Minister of Sarawak, is the single most important figure in establishing and maintaining the rampant corruption

31 Forests Ordinance, 1958 (Chapter 126), §51A(1), 93 and Forests Bill, 2015, §42(1).

32 Council on Ethics (supra, note 18), 9.

33 Id., 10.

34 Ibid.

35 'Legality Verification of Logs in Sarawak,' Ministry of Resource Planning and Environment (MRPE), October 2012, URL: http://www.kpps.sarawak.gov.my/modules/web/pages.php?mod=download&sub=download_show&id=118

36 Global Witness (supra, note 3), 15.

37 Id.

38 Hoare (supra, note 19), 16.

that plagues the state of Sarawak.³⁹ Another international environmental association, Bruno Manser Fund, asserts that Taib, while serving as the Minister of Resource Planning and Environment from 1985 to 2014, has had absolute control over the allocation of logging licenses, securing profits for himself and his family through concessions.⁴⁰ A covertly filmed video by Global Witness demonstrated the merit behind these assertions, showing members of the elite, including Taib's immediate family, frankly discussing how easy it is for them to get their hands on land and concessions by asking favors of Taib. They also were upfront about the fact that the state also takes a cut, usually 10%, from every major land deal in Sarawak.⁴¹ According to Bruno Manser Fund, the vast majority of logging concessions and the attendant profits have also gone overwhelmingly to Sarawak's six logging giants, the Samling group, the Rimbunan Hijau Group, the WTK Group, the Ta Ann group, the KTS timbers and plantation group, and the Shin Yang group, who all have intimate ties with Taib's apparatus.⁴²

Besides this, the royalties from logging are the single largest source of revenue for the Sarawak government.⁴³ As such, the Sarawak government has common interests with the timber industry, and, in collusion with the huge logging corporate groups, has issued logging licenses recklessly. As explained above, priority has been given to the development of the timber industry over the protection of indigenous peoples, leading to the rapid destruction of forests together with the serious infringement of human rights of the indigenous peoples.

4. Recent Developments

Taib stepped down as Chief Minister of Sarawak in February 2014. His successor, Adenan Satem, has expressed his serious intent to address the problem of illegal logging.

In October 2014, Satem announced that the state government would not issue any new logging licenses until the illegal logging activities were addressed.⁴⁴ Moreover, he directly warned key senior officials from the aforementioned six large companies that they, including their sub-contractors and other relevant parties, must not engage in illegal logging, as the licenses have been used to log timber illegally outside concession areas.⁴⁵ In April 2015, the State Legislative Assembly of Sarawak passed a bill (Forests Bill, 2015) to drastically raise the penalties outlined in the Forests Ordinance 1953, which governs illegal logging.⁴⁶ Furthermore, the Malaysian Anti-Corruption Commission, a federal organization, has recently commenced a sweeping campaign against illegal logging, seizing illegally logged timber and freezing relevant bank accounts.⁴⁷

39 Global Witness (supra, note 3), 3.

40 Bruno Manser Fund (supra, note 7), 16.

41 'Inside Malaysia's Shadow State,' Global Witness, March 19, 2013, URL:

<https://www.globalwitness.org/campaigns/forests/inside-malaysias-shadow-state/>

42 Bruno Manser Fund (supra, note 7), 31-32.

43 Id., 23-24.

44 Jack Wong, 'More gains for Sarawak timber firms,' The Star Online, October 20, 2014, URL:

<http://www.thestar.com.my/Business/Business-News/2014/10/20/More-gains-for-Sarawak-timber-firms-Tough-measures-by-the-state-government-to-dramatically-reduce-ill/?style=biz>

45 Desmond Davidson, 'Sarawak warns timber companies over illegal logging, as MACC probes industry,' The Malaysian Insider, November 17, 2014, URL: <http://www.themalaysianinsider.com/malaysia/article/sarawak-warns-timber-companies-over-illegal-logging-as-macc-probes-industry>.

46 Sharon Ling, 'Sarawak passes Forests Bill, ups penalties to RM1mil fine and 10 years' jail,' The Star Online, April 22, 2015, URL: <http://www.thestar.com.my/News/Nation/2015/04/22/Sarawak-Forests-Bill-passes/>

47 Andy Chua, 'MACC speeds up probe on illegal logging in Sarawak,' The Star Online, May 16, 2015, URL: <http://www.thestar.com.my/News/Nation/2015/05/16/MACC-speeds-up-probe-on-illegal-logging-in-Swak/>

However, it is necessary to continue to watch with caution and prudence whether the Sarawak government will implement its forest policy in a manner that respects NCR. For instance, the 2015 Forests Bill, which passed the State Legislative Assembly of Sarawak in April 2015, still contains a provision stipulating that NCR may be extinguished by notification in the gazette and a newspaper and on the notice board of the government office.⁴⁸ Those indigenous peoples who are affected by such extinguishment shall be entitled to compensation upon application to the government;⁴⁹ however, this provision is criticized as unfair because the affected indigenous people would not be practically able to avail themselves of this compensation, since the gazette or newspapers do not reach the areas where indigenous people live and since illiterate indigenous people could not understand them even if they did.⁵⁰ Therefore, it is necessary to continue carefully watching whether the Sarawak government will implement its forest policy in a manner that respects NCR.

48 Forests Bill, 2015, § 22(1)(2).

49 Id, § 22(3)(4).

50 Desmond Davidson, 'New Sarawak forest law unfair to natives, says state PKR,' The Malaysian Insider, April 23, 2015, URL: <http://www.themalaysianinsider.com/malaysia/article/new-sarawak-forest-law-unfair-to-natives-says-state-pkr>

IV. Infringement of Indigenous People's Rights caused by Illegal Logging

In Sarawak, there has been no end to cases in which logging companies are granted logging licenses violation of NCR, and or otherwise begin logging illegally after obtaining a license legally. Such illegal logging practices destroy forestland where indigenous people make their livelihoods; depletes fish, wildlife, and supplies such as vegetables; and eliminates medicinal herbs and construction materials like palms.⁵¹ It has also been reported that the river is contaminated because of the illegal logging, causing many inhabitants to suffer from dermatological diseases.⁵²



Forest in Sungai Kain, Balleh Kapit (Sep. 27, 2015)

Riparian forests are logged and the river waters indigenous peoples depend on daily are contaminated.

Logging companies such as Shin Yang Group claim that they discuss issues with the leaders of affected communities, so discussions with the entire community are not necessary.⁵³ However, it has been reported that not every member of the community affected by the logging attends meetings with the logging company, and that leaders make decisions at the meeting without preliminary consultation with community members.⁵⁴ In addition, there have been cases reported where leaders have been bought out in return for permission to log or where leaders opposed to the development project have been threatened and assaulted.⁵⁵

A number of lawsuits have been filed by indigenous people. However, lawsuits sometimes take up to ten years to go through the full litigation process.⁵⁶ So even if a decision in favor of the natives is reached, in many cases the land at issue has already been completely deforested by the time of the court decision. For example, in both *Tr Sandah ak Tabau*⁵⁷ and *Tr Gayan anak Tupai*⁵⁸ cases, the High Court Sibul held that the plaintiffs, all of them

51 'Report of the National Inquiry into the Land Rights of Indigenous Peoples' ('Report of National Inquiry'), 2013, SUHAKAM, URL: http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL_CD.pdf, para 7.61.

52 *Id.*

53 *Id.*, para 7.64.

54 *Id.*, para 7.65.

55 *Id.*, para 7.101.

56 Lim Teck Wyn, 'Malaysia: Illegality in Forest Clearance for Large-scale Commercial Plantations,' *Forest Trends*, December 2013, URL: http://www.forest-trends.org/documents/files/doc_4195.pdf 25.

57 *Tr Sandah ak Tabau & 7 Ors v Kanowit Timber Sdn Bhd & 2 Ors* [High Court Sibul Civil Suit No 21-2-2009].

58 *Tr Gayan anak Tupai & 3 Ors v Vita Hill Sdn Bhd & 2 Ors* [High Court Sibul Civil Suit No 21-4-2009].

Iban people, have NCR for their land. However, by the time the judgment was made, the majority of the forest at issue had already been deforested.⁵⁹

Under such circumstances, there is no effective measure for indigenous people to counteract sudden deforestation of their land other than protest. The outcome of some protests, however, has been assault by logging companies and their affiliates.

For instance, it was reported that on February 14, 2011, an Iban father and son protesting illegal deforestation were assaulted by logging company affiliates, knocked unconscious and left in critical condition.⁶⁰ The pair reported the illegal logging activity to the police, the Land Investigation Department, and the Public Works Department, but none of them showed interest in enforcing compliance or the protection of NCR in the Iban community.⁶¹ The perpetrator has not been identified yet, as the police department was reluctant to investigate the case.⁶² Also it is reported that logging companies, the police, and government officials utilize a crime syndicate to threaten indigenous peoples, and that those NGOs and community organizations supporting the indigenous peoples who protest against deforestation are frequently harassed by the police.⁶³

Moreover, according to Mr. Nicholas Muja from the Sarawak Dayak Iban Association, the reality of indigenous peoples' lives after being ousted from their land is extremely grave. Ousted from their land, they have no choice but to live in the city, but it is difficult for indigenous peoples to make a living in the city due to high rates of illiteracy and other factors. They are forced to live in a harsh environments like slums. This is especially difficult for indigenous women, who find it is difficult to be hired for even manual labour, and those in this very vulnerable position are often victimized by human trafficking and other crimes.

59 An e-mail sent to HRN from NGO involved in issues of illegal logging.

60 'Gang Rule In Sarawak' Sarawak Report, FEB 18, 2011, URL: <http://www.sarawakreport.org/2011/02/gang-rule-in-sarawak/>

61 Id.

62 Id.

63 SUHAKAM (supra, note 50), para 7.101.

V. Legal Perspectives on the Land Rights of Indigenous Peoples

NCR and land rights are guaranteed under the Federal Constitution of Malaysia and Sarawak's land law. The indigenous peoples' NCR does not include the property rights to the land itself. However, it does include the right to move freely about their land, according to their own customs and laws, and to sustain themselves from the land itself. Thus, third parties cannot disturb or interfere with indigenous peoples' lands, except where state law provides otherwise. In order to protect their customs and traditions, indigenous people have brought cases for their land rights, or NCR, under these laws and common law.

However, the legal definition and scope of NCR are unclear, which has caused legal disadvantages to be imposed on the indigenous populations. This chapter aims to provide an accurate definition of NCR and how it is understood under the jurisdiction of Sarawak. This chapter also provides information about the status of NCR in Malaysia from the stance of international human rights standards.

1. Domestic Laws (Statutory Law)

Although most provisions of the Federal Constitution apply in Sarawak, there are certain federal laws that do not apply, such as the Local Government Act 1976, and the National Land Code and the Employment Act 1955. The state of Sarawak agreed to join the Malaysian federation in 1963 only upon the condition that it would maintain a large amount of autonomy in order to protect the rights of its indigenous peoples, and has legislated its own laws to protect them. On the issue of NCR, the Sarawak Land Code of 1958, which is one of the laws unique to Sarawak, is the most relevant and detailed statutory law. However, as described below, protection of NCR by the Sarawak Land Code 1958 is insufficient and narrower than the NCR originally guaranteed in the Federal Constitution of Malaysia.

A) Federal Constitution of Malaysia

Principle of Equality

Article 8(1) of the Federal Constitution of Malaysia guarantees that all persons are equal before the law.⁶⁴ Article 8(2) further stipulates that "Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law...or in the administration of any law relating to the acquisition, holding or disposition of property..."⁶⁵

Right to Property

Article 13(1) of the Federal Constitution guarantees all peoples' right to property.⁶⁶ Furthermore, if the right to property has been denied by means of "compulsory acquisition or use," adequate compensation for that property must be paid to the injured party.⁶⁷

⁶⁴ Federal Constitution of Malaysia, Article 8(1).

⁶⁵ Id, Article 8(2).

⁶⁶ Id, Article 13(1).

⁶⁷ Id, Article 13(2).

Special Protection of Indigenous People in Sarawak

Article 153 (1) of the Federal Constitution states:

[I]t shall be the responsibility of the *Yang di-Pertuan Agong* to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.⁶⁸

The following clauses further explain the procedures that are necessary in order to promote the advancement and well-being of the Malays and natives in Sabah and Sarawak.⁶⁹ This article recognizes the government of Malaysia's responsibility to protect indigenous populations within Sarawak.

Definition of "Native"

Under Article 161(A), Clause 6(a), the term "native" in relation to Sarawak is defined as "a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races...."⁷⁰ Clause (7), which is referenced in the above clause, further stipulates what tribes or races are deemed as indigenous to Sarawak.⁷¹

Thus, property rights of indigenous peoples in Sarawak are guaranteed as of other citizens and, furthermore, special protection of them is recognized under the Malaysian Federal Constitution.

B) Sarawak Land Code 1958

The Sarawak Land Code 1958 stipulates the system of land classification in Sarawak aiming to "regulate land use in a multiracial society and to define and protect the land rights of indigenous people."⁷² Under this law, all lands in Sarawak are categorized as one of five categories:⁷³

- i. Native Customary Land (NCL) which is land in which customary rights, whether communal or otherwise, have been declared by Order of the Governor in Council for any native community, which will be regulated by the native law of the community.
- ii. Mixed Zone Land, which is land that may be held by any citizen without restriction.
- iii. Native Area Land, which is land only held by natives with a registered document of title.
- iv. Reserved Land, which is land: (1) that the Government reserves under the Sarawak Land Code 1958, (2) located within a National Park, or forests that are protected or communal, or (3) occupied by the Federal or State Authorities
- v. Interior Area Land, which is land that does not fall under Mixed Zone or National Area Land or Reserved Land for which title cannot be registered.

68 Id, Article 153(1).

69 Id, Articles 153(2) to (10).

70 Id, Article 161(A), subsection 6(a).

71 The races to be treated for the purposes of the definition of "native" in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

72 Although the purpose mentioned above is for the Land (Classification) Ordinance 1948, the 1958 Sarawak Land Code is thought to act as the successor to the Code and its intentions and was enacted in order to integrate several preceding regulations. SUHAKAM (supra, note 50), para 4.84-4.90.

73 Id.

Section 5(1) of the law recognizes native customary rights as follows:

As from the 1st day of January 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as foresaid but without prejudice to the provision hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.⁷⁴

In simple terms, this Section states that on and after January 1, 1958, any new designations of NCR are recognized only when in accordance with the provisions of this law.

Following the above section, Section 5(2) dictates the methods by which indigenous people may newly acquire native customary rights on and after January 1, 1958:

- a) The felling of virgin jungle and the occupation of the land thereby cleared;
- b) The planting of land with fruit trees;
- c) The occupation or cultivation of land;
- d) The use of land for a burial ground or shrine;
- e) The use of land of any class for rights of way; or
- f) Any other lawful method (deleted in 2000)⁷⁵

Indigenous people may acquire NCR on Interior Area Land pursuant to any one of the above methods and by obtaining permits under Section 10. However, until a document of title is issued, the land remains the property of the State.⁷⁶ In case of a dispute over whether there are any native customary rights existing in an area, the land shall be presumed to be possessed by the state until proven otherwise.⁷⁷ Moreover, in practice the issuance of the above-mentioned permits is rare.⁷⁸

The law does not particularly prescribe NCR acquired on or before December 31, 1957. However, there is a provision stating that the question of existence or extinguishment of such NCR shall be determined by prior laws,⁷⁹ and therefore, it can be said that the law recognizes NCR on or prior to December 31, 1957.⁸⁰ Nevertheless, it is reported that many claims of NCR are not registered and as a result, do not possess legal recognition.⁸¹

The Sarawak Land Code also prescribes how native customary rights are extinguished under the law. Section 5(3) provides that “(a) any native customary rights may be extinguished by direction issued by the Minister.”⁸² The only condition which the Minister is required to fulfill for the exercise of his discretion is to

74 Sarawak Land Code, 5(1).

75 Id, 5(2).

76 Id, 5(2)(i).

77 Id, (7).

78 SUHAKAM (supra, note 50), para 4.89.

79 Sarawak Land Code, 5(2)(ii).

80 SUHAKAM (supra, note 50), para 4.84.

81 Hoare (supra, note 19), 13.

82 Sarawak Land Code, 5(3)(a)

publicize the extinguishment of such rights in a newspaper and public posting.⁸³ Compensation must be made to any person who establishes their claims to the rights.⁸⁴

As shown above, the guarantee of NCR under the Sarawak Land Code is insufficient, as it does not provide adequate legal guidelines regarding NCR. As a consequence, the guarantee of NCR was established through court decisions.

2. Court Decisions (Common Law)

Although, as explained above, there are relevant laws for recognizing NCR under some circumstances, the scope of NCR guaranteed by the relevant laws is significantly limited. Thus, the concept of NCR has been primarily developed through common law jurisdiction. In Malaysia, there are three kinds of superior courts: the High Courts (the High Court in Malaya and the High Court in Sabah and Sarawak), the Court of Appeal, and the Federal Court. The Federal Court is the highest court of the country, and the High Court in Sabah and Sarawak is the lowest superior court for the people in Sarawak. Many of the court decisions, including those from the Court of Appeal and the Federal Court in Malaysia, show understanding regarding the rights of indigenous people and recognize and protect NCR. These court cases regarding the rights of indigenous peoples clarified the actual content of NCR through examination of both statutory law and common law.

Among other cases, The Federal Court decision in the Madeli case (2007) is important in understanding how the court recognized NCR and conferred protection.⁸⁵ The facts, issues, and holdings of the case are as follows.

[Facts]

Madeli Salleh, the plaintiff, alleged that he and his father had acquired and exercised NCR over the disputed land as they had cleared the land and paid visits once a month for their rubber and fruit cultivations for many years prior to January 1, 1958. The defendants contended that no such right could have been created because the disputed land was part of an area reserved for use by the Sarawak Shell Oilfields Limited (“Shell Concession Area”) under the 1921 Order and that the plaintiffs did not live on the disputed land and therefore did not occupy it.

[Issues and Holdings]

Issue 1: Whether the 1921 Order extinguished NCR acquired before 1921.

The Federal Court supported the decision of the Court of Appeal that NCR had been recognized long before the 1921 Order and that the Order does not have legal effect to extinguish NCR acquired before 1921.

The Federal Court, adhering to the prior Appellate Court decisions such as *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (1988),⁸⁶ which recognized NCR as existing rights created by common law without need for any statutory law, and *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (2006)⁸⁷ which recognized NCR in Sarawak, re-emphasized the pre-existing customary laws concerning property rights, stating:

83 Id.

84 Id.

85 Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509.

86 *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 and *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors* [1998] 2 CLJ 665.

87 *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769.

We wholly agree with the view expressed in Adong bin Kuwau and Nor ak Nyawai that the common law respects the pre-existence of rights under native laws or customs... The Federal Court has also established a high burden that the government must meet in extinguishing these preexisting rights, since such extinguishment must be clear and unambiguous in legislation, rather than implied through some other action of the government.

Issue 2: Whether NCR is established without physical presence on the land.

The Court made clear that occupation does not require continuous physical presence, so long as a sufficient measure of control is exercised over land, stating:

[t]here can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering.... The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non-occupation of the said land.

Whereas the Appellate Court in Nyawai adopted a narrower interpretation of the scope of NCR, holding that only settlement and cultivation were considered as occupation, The Federal Court in Madeli expanded the scope stating that the recognition of NCR does not require continuous physical presence such as settlement. Therefore, there is a high possibility that NCR can be recognized with respect to the land used for hunting, fishing, logging, and gathering, provided that there exists a sufficient measure of control to prevent strangers from interfering.

Reviewing the case law, it is evident that the land rights of native peoples are guaranteed under common law, establishing legal enforcement of NCR, even if there is no relevant statutory provision. In other words, if licenses issued by the government, whether for logging or other purposes, infringe upon NCR, their issuance will be illegal, and indigenous peoples may continue to enjoy their NCR.

3. Practice of Domestic Laws

A) SUHAKAM Report

SUHAKAM, established in 1999 as Malaysia's Human Rights Commission, conducted the National Inquiry into the Land Rights of Indigenous Peoples in Malaysia from December 2010 to June 2012 to examine the root causes of land issues which indigenous peoples face from a human rights standpoint. The National Inquiry Report published in April 2013 pointed out, among other things, the following issues regarding NCR in Sarawak:

- 1) The administrative authority in Sarawak recognizes NCR only when the conditions prescribed in the Sarawak Land Code 1958 are met, not respecting the interpretation of NCR established by court decisions.⁸⁸ The Sarawak Land Code does not take into account indigenous peoples' perspectives on the occupation and management of a territory, or their ideas of common land.⁸⁹ Therefore, NCR of semi-nomadic or nomadic tribes are not protected.⁹⁰

⁸⁸ SUHAKAM (supra, Note 50), para 7.6 & 7.8

⁸⁹ Id.

⁹⁰ Id, para 7.9.

- 2) Inordinate delays in the processing of applications for native titles have often been observed, and during such delays provisional leases have been issued by the government to third parties over lands that were subjects of the native applications.⁹¹ In addition, while a land survey is a prerequisite for obtaining a native title,⁹² inordinate delays in the land survey have also been observed, resulting in a similar problem.⁹³
- 3) Although indigenous people often file lawsuits to receive confirmation of their NCR, evidence for their claims tends to become scattered and lost when lawsuits are too lengthy.⁹⁴ Delays in a trial prevent them from enjoying their NCR.
- 4) Due process with prior and informed consent is not guaranteed for indigenous people. Even when a company holds prior consultations, it is not every member of a village wishing to attend, but rather only a representative of the village who can attend the meeting.⁹⁵ There are cases where leaders of a community make decisions at the meeting without preliminary consultation with other community members,⁹⁶ where leaders have been bought out by the companies, and where leaders opposed to a development project are threatened and assaulted.⁹⁷ Moreover it is reported that logging companies, the police, and government officials utilize a crime syndicate to threaten indigenous peoples, while those NGOs and community organizations supporting the people who protest against the projects are frequently harassed by the police.⁹⁸

SUHAKAM created 71 proposals detailed in 18 sections to protect native rights, based on the findings of the investigation in various locations in Malaysia, including Sarawak. The following proposals are among those relevant to illegal deforestation in Sarawak.

Proposal 1: Secure Indigenous Peoples' Land Rights

- The lack of protection for indigenous peoples' land rights has caused various issues such as eviction of indigenous people for the purpose of development projects, invasion of their land by plantations, and illegal transactions executed by the third parties using a proxy statement. The government must secure indigenous peoples' land rights.⁹⁹
- The government must make a decision based on relevant documents and evidence collected through intensive investigation over the land at the time of the issuance of a license. It must also improve the preliminary notification process to make sure affected people sign a receipt and receive a copy.¹⁰⁰
- The law must be amended and administrative decisions must be made in accordance with the court decisions recognizing indigenous peoples' rights.¹⁰¹

Proposal 2: Clarify the concept of customary land rights

- The government should review standards for establishing NCR under Sarawak Land Code 1958 and include

91 Id, para 7.14 & 7.31.

92 Id, para 7.18.

93 Id, para 7.20.

94 Id, para 7.82.

95 Id. para 7.64.

96 Id. para 7.65.

97 Id. para 7.101.

98 Id. para 7.101.

99 Id. para 10.6.

100 Id, para 10.7.

101 Id, para 10.9.

customary land use in the standard.¹⁰²

Proposal 3: Compensation for Customary Land Rights, Proposal 4 : Remedy Mechanism

- For the deprivation of indigenous peoples' land, adequate compensation must be paid in accordance with Article 13 of Federal Constitution of Malaysia.¹⁰³ At the occasion of the payment, the affected indigenous people must be treated respectfully.¹⁰⁴
- In order to resolve conflicts regarding indigenous peoples' land, an Indigenous Land Tribunal or Commission, consisting of retired judges and experts on indigenous peoples' land issues must be established.¹⁰⁵

Proposal 9: Promotion of Successful Development Plan

- Companies must ensure good governance as to lands and leasehold rights. Good governance includes obtaining prior and informed consent from all injured parties, especially indigenous people who have customary land rights.¹⁰⁶
- Companies must be respectful and responsible for the human rights of indigenous people in accordance with the Ruggie Principles, the Sustainable Development Framework of the International Council on Mining and Metals, and the World Bank and Asian Development Bank operational guidelines.¹⁰⁷
- In order to ensure the legality of timber to reduce the illegal timber trade, indigenous peoples' rights must be adequately ensured in such a way that members enter voluntary partnership agreements to trace logging sites of the timber.¹⁰⁸

Proposal 11: Settlement of Conflicts as to Indigenous Peoples' Customary Land

- Regarding customary land claims by indigenous peoples, the decision must be made based on relevant documents and evidence collected through intensive investigation over the land.¹⁰⁹
- Any claim to indigenous peoples' customary land must be reviewed prior to a transfer of the land based on the establishment of provisional leasehold rights and licenses regarding the land, or the execution of the project.¹¹⁰
- Relevant laws must be reviewed and amended in accordance with international norms. Especially, it must be recalled that the Guiding Principles on Business and Human Rights obliges corporate operations to respect human rights. Even when the nation has a guideline or law to protect the human rights of the citizens, companies still have the obligation to respect human rights.¹¹¹

Proposal 13: Promotion of indigenous peoples' involvement in forest management

- The government should ensure that indigenous communities are able to be involved in policymaking processes on the management of tropical rainforest, especially, the protection of the forest.¹¹²

Proposal 18: Recognizing the importance of lands for indigenous people

- Tropical rainforest is not only bread and butter for indigenous people, but also a part of their spiritual and

102 Id, para 10.9.

103 Id. para 10.16 & 10.17.

104 Id, para 10.18.

105 Id, para 10.19.

106 Id, para 10.44.

107 Id, para 10.45.

108 Id, para 10.46.

109 Id, para 10.51.

110 Id, para 10.52.

111 Id, para 10.53.

112 Id. para, 10.57.

cultural life which built their identities as a people. This must be recognized by society through various policies, including affirmative action.¹¹³

B) Response by the Malaysian Government to the SUHAKAM Report

The Malaysian government set up a task force to consider the proposals in the SUHAKAM report, and in June 2015 the government decided to accept most of the recommendations made by the taskforce.¹¹⁴ The recommendations included the accurate recognition of indigenous peoples' land rights, making prior notifications to affected people before development projects, and obtaining preliminary consent from those affected people. The Malaysian Government must implement each recommendation within the time frame of one to three years.¹¹⁵

As discussed above, the Malaysian government can be praised for intensifying its efforts to regulate illegal logging and protect indigenous peoples' rights, but the definition of illegal timber continues to leave room for broad interpretation. If the taskforce recommendations are effectively implemented, the situation of indigenous peoples' human rights in Sarawak will improve substantially. However, whether the recommendations will be put into practice depends on factors such as cooperation from the Sarawak government, and the development of the situation should be closely observed. Among other issues, there are fears that the cabinet committee in charge of implementing the recommendations may not be transparent because it is not likely to include representatives of indigenous people.¹¹⁶ Therefore, there are reasons to be concerned about whether the reforms will be made for the sake of indigenous peoples.

4. International Human Rights Standards

Indigenous peoples' rights to land are guaranteed not only by domestic Malaysian laws but also by international human rights standards. Based on these standards, many countries and international organizations have expressed their concerns over human rights infringements against indigenous peoples in Malaysia. In examining international human rights standards, it is apparent that Malaysia's practices are not acceptable in the international community.

A) International Human Rights Sources

The Universal Declaration of Human Rights (UDHR) is the fundamental international document defining basic human rights and freedoms.

Article 17 of the UDHR protects the right to property and prohibits the arbitrary deprivation of property.¹¹⁷ Article 27 provides that everyone has the right to freely participate in cultural life.¹¹⁸ As the UDHR is the internationally recognized standard of all fundamental rights and widely regarded as expressing duties under customary international law, the indigenous people in Sarawak should be guaranteed the right to not be arbitrarily

113 Id, para, 10.75.

114 Loh Foon Fong, 'Cabinet forms committee on indigenous land rights,' The Star Online, June 17, 2015, URL:<http://www.thestar.com.my/News/Nation/2015/06/17/cabinet-approves-indigenous-lands-rights/>

115 Id.

116 William Manger, 'Orang Asal want Parliament' s action on land rights,' FMT news, June 22, 2015, URL:

<http://www.freemalaysiatoday.com/category/nation/2015/06/22/orang-asal-want-parliaments-action-on-land-rights/>

117 The Universal Declaration of Human Rights (1948), Article 17.

118 Id, Article 27.

deprived of their property and the right to freely participate in their cultural lives.

Similarly, The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which is the most comprehensive document for the protection of indigenous peoples, recognizes a wide range of basic human rights for indigenous peoples.¹¹⁹

Article 10 stipulates that indigenous people shall not be removed from their lands or territories without prior consent.

Article 10 (Prohibition of forced migration)

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 25 to 28 provide a detailed explanation of indigenous peoples' right to their land.

Article 26 (The right to the lands, territories and resources)

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 28 stipulates remedies and compensations.

Article 28 (The right to redress for the lands, territories and resources)

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

As Malaysia is one of the 143 signatories to the UNDRIP, Malaysia is expected to be in conformity with these provisions. However, observing the indigenous peoples' situation in Sarawak as described above, it is apparent that the Malaysian government and the Sarawak state government do not follow the international standards of human rights protection of indigenous peoples stipulated in UNDRIP, including their land rights.

119 United Nations Declaration on the Rights of Indigenous Peoples (2007). See Japanese translation with below URL. http://www.un.org/esa/socdev/unpfi/documents/DRIPS_japanese.pdf

B) The Universal Periodic Review on Malaysia (2013)

In 2013, Malaysia was selected for Universal Periodic Review (UPR), the primary review of a state's human rights record among members of United Nations Human Rights Council. In the UPR, many countries (Switzerland, Norway, Sweden, New Zealand, Finland, and Bolivia) were concerned about Malaysia's obvious violations of indigenous people's rights and recommended considerate treatment of the indigenous peoples, especially regarding NCR in Sarawak.¹²⁰ However, Malaysia did not accept any of these recommendations concerning the land rights of indigenous peoples,¹²¹ including the recommendation by Denmark for Malaysia to call for a visit by the UN Special Rapporteur on the rights of indigenous peoples.¹²² Malaysia explained its rejection by arguing that these issues were currently being examined by a task force established by the government to consider the recommendations of the SUHAKAM report as described in Section 3.A., and that it did not wish to issue a decision before the outcome of the task force's deliberations.

C) Report by UN Special Rapporteur on the Right to Food (2014)

Olivier De Schutter, UN Special Rapporteur on the right to food, officially visited Malaysia from December 9 to 18, 2013, and published the report on February 18, 2014. The report noted that indigenous peoples' access to their lands has a direct connection with their right to food¹²³ because they may fall into extreme poverty and suffer from lack of food if they lose access to the forests and lands on which their livelihoods depend.¹²⁴ The Special Rapporteur expressed his concern for the fact that NCR has been recognized only for lands that indigenous people actually work within a certain period of time, such that lands used for livestock pasturing, hunting, fishing, and cyclical farming are excluded from the scope of NCR.¹²⁵ Also, when land is utilized for commercial purposes, indigenous people not only lose access to the land, but they also fail to receive adequate compensation due to a lack of ensuring discussion on the matter.¹²⁶

Based on these facts, the Rapporteur recommended the Malaysian government meet the recommendations described in SUHAKAM report, especially to establish a National Commission on Indigenous Peoples for protecting indigenous peoples' rights and ensuring that the state's policies and legislation are in accordance with UNDRIP.¹²⁷

The Special Rapporteur also recommended Malaysia ratify the Indigenous and Tribal Peoples Convention, 1989 (No. 169) by the International Labor Organization, and establish procedures to ensure that companies receive indigenous people's free, prior, and informed consent for any development project affecting their life and land.¹²⁸

120 Countries which showed their concerns are Switzerland, Norway, Sweden, New Zealand, Finland and Bolivia; See Human Rights Council, Report of the Working Group on the Universal Periodic Review: Malaysia, A/HRC/25/10, 4 December 2013, paras 146.209-146.214, available at URL: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MYSession17.aspx>.

121 Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/25/10/Add.1, 4 March 2014, available at URL: http://lib.ohchr.org/HRBodies/UPR/Documents/Session17/MY/A_HRC_25_10_Add-1_Malaysia_E.doc, 5.

122 Id, para 146.46.

123 A/HRC/25/57/Add.2/, para 65.

124 Id.

125 Id at para 67.

126 Id.

127 Id at para 78(m).

128 Id at para 78 (n).

D) Conclusion

Malaysia is clearly not following the standards of international human rights established in several documents and recommendations by the United Nations Commission on Human Rights. Although the laws in Malaysia claim to protect the land rights of indigenous peoples, they do not provide sufficient protections of rights found in international human rights standards, and even such provisions which claim to offer protection are not fully implemented, resulting in persistent and grave violations of human rights. Malaysia should promptly address these issues to realize the full protection of indigenous people's rights based on international human rights standards.

VI. Responsibilities of the Japanese Government and Japanese Companies

Japan is the fourth largest timber consumer state following the United States, Europe, and China, and the second largest importer of tropical rainforest timbers following China.¹²⁹ In addition, Japan still imports and consumes nearly 40% of all timber and timber products exported by Sarawak as of 2012.¹³⁰ As discussed above, Japan plays an important role in the international timber market, including the market for Sarawak logging products.

This section explains how illegally logged timbers from Sarawak are actually used in Japan, including some specific examples. Given that Japan's inadequate regulations to restrict illegally logged timber cause an inflow of the illegal timber into Japan, it also considers Japan's regulation and its problems compared to international human rights standards and the regulations in other countries.

1. Usage of illegally logged Sarawak timbers in Japan

A) Japanese Companies using Timber from Sarawak

Private companies in Japan import a substantial portion of Sarawak wood. A 2012 study showed that Japan at the time was responsible for 38% of Sarawak timber's exported trade in value terms, estimated to be roughly US \$900 million worth.¹³¹

The major importers include the following companies and their subsidiaries (in no particular order).

- Sojitz Corporation
- Itochu Corporation
- Sumitomo Forestry Co.
- Sumisho & Mitsubussan Kenzai Co.
- Marubeni Building Materials Corporation
- Toyo Materia Corporation
- Japan Kenzai Co.

Also, the following large construction companies are using illegally logged timber in their construction projects (in no particular order).

- Shimizu Corporation
- Kajima Corporation
- Taisei Corporation

B) Examples of the Use of Sarawak Timber in Japan

¹²⁹ Global Witness (supra, note 3), 7.

¹³⁰STIDC, 'Export Statistics of Timber and Timber Products Sarawak 2012,'

URL: http://www.sarawaktimber.org.my/timber_statistic/Export_Statistics_Timber_Products_Sarawak_2012.pdf, 3.

¹³¹ STIDC (supra, note 124).

The following section introduces case studies to show the reality of the import and use of Sarawak timber in Japan.¹³² In the case studies below, two Malaysian companies involved in illegal logging, Samling Group and Shin Yang Group, and their Japanese trading partners are introduced, but Malaysian companies illegally logging are not limited to these two companies, and the problem of illegal logging is prevalent throughout the timber industry in Sarawak¹³³. Therefore, it should be borne in mind that the problem of illegal logging affects all private companies in Japan which have a business relationship with the Sarawak timber industry.

Case 1: Samling Group, Sojitz and Itochu

According to a Global Witness report published in September 2013, logging on steep slopes and close to riverbanks has been conducted extensively in the concessions granted to the Malaysian logging company the Samling Group, in violation of the terms of the licenses it possesses.¹³⁴ The report states that Sojitz and Itochu have purchased logs from the concessions of Samling Group where systematic illegal logging has been found in addition to plywood from the mills that source timber from the concessions.¹³⁵

Case 2: Shin Yang Group, Sojitz and Itochu

According to a Global Witness report published in September 2013, Shin Yang Group, a major timber supplier for Japanese companies, has conducted illegal and unsustainable logging operations, including logging on steep slopes and in proposed national parks.¹³⁶ The report states that Sojitz and Itochu were purchasing this illegal timber.¹³⁷

In light of these criticisms, in September 2015, Sojitz developed a new timber procurement policy articulating that the company will not use illegally logged timbers and will make efforts to reduce the negative impacts on human rights caused by deforestation¹³⁸. Also, it is reported that the Shin Yang Group and the Samling Group began to conduct third party investigations into the illegality of their practices and to obtain forest certification, after Itochu pressured them to do so¹³⁹. Furthermore, Itochu's "Policy on Procurement of Wood, Wood Products, Paper Manufacturing Materials, and Paper Products" articulates that the company does not procure forest products from "any suppliers who contribute to serious environmental or social problems, such as the destruction of High Conservation Value Forest".

Despite these activities, both Sojitz and Itochu still maintain business relations with large logging companies engaged in illegal logging. Thus, it is evident that the current measures described above are still not sufficient to prevent the inflow of illegal timber.

132 The descriptions of the case studies are sourced from Global Witness (supra, note 3).

133 For example, Norway Government Pension Fund withdrew its investment from WTK and Ta Ann as they were found to be involved in illegal logging by an investigation by the Ethics Committee. Annual report 2014 Council on Ethics for the Government Pension Fund Global, URL: <http://etikkradet.no/files/2015/01/Council-on-Ethics-2014-Annual-Report.pdf>. Also, as previously described, Satem, the Chief Minister of Sarawak, directly warned management of the six companies not to be involved in illegal logging.

134 Global Witness (supra, note 3), 8-9.

135 Id.

136 Id. at 10.

137 Id. at 10.

138 Answer to an inquiry by HRN.

139 Answer to an inquiry by HRN.

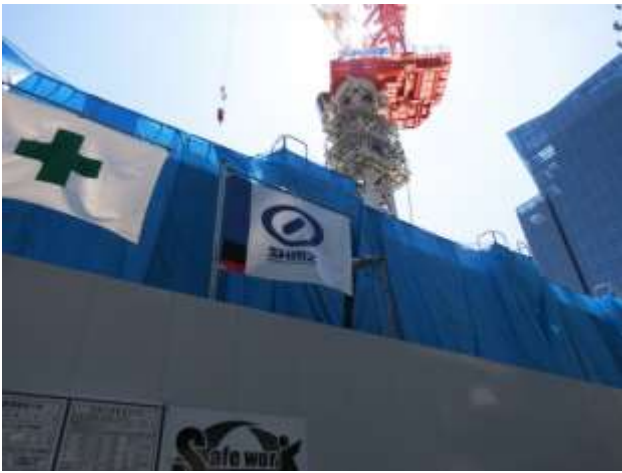
Case 3: Usage of plywood for molding concrete by the construction industry—Shimizu Corporation, Kajima Corporation and Taisei Corporation

According to a Global Witness report published in December 2014, a large portion of timber imported from Sarawak is used in construction sites in Japan as disposable plywood for molding concrete.¹⁴⁰ The report also notes that plywood produced by Shin Yang Group, criticized for its illegal logging, is used in major construction sites in Tokyo, including (1) the Shimizu Corporation’s Higashi-Ueno Ni-chome Project, (2) the Taisei Corporation’s Shinagawa Season Terrace, and (3) the Kajima Corporation and others’ Kioi-cho Project.¹⁴¹

The pictures below are of sites (1) and (2).



140 Global Witness, Shototsu-suru-futatsuno-sekai (「衝突する2つの世界」)' (Dec. 2014), URL: <https://www.globalwitness.org/olympicsjp/>
141 Id.



①Construction site of Shimizu Corporation (source: Global Witness)



②Construction site of Taisei Corporation (source: Global Witness)

Responding to these criticisms, several companies say that they are reviewing their timber procurement policy. For example, Taisei Corporation responded that it publicly reports on the amount of tropical plywood it uses

for concrete formworks as part of an effort to increase its use of alternative materials.¹⁴² It has also been reported that several branches of Kajima Corporation have instructed their contractors to stop procurement of plywood from Shin Yang Group since May 2014,¹⁴³ and that they are also looking into alternative materials.¹⁴⁴ Shimizu Corporation responded that it is raising the issue of illegal logging in Sarawak with its procurement office and subsidiaries.¹⁴⁵

Nevertheless, without a stop to procurement itself, the tepid methods described above remain inadequate and are insufficient as a fundamental solution for preventing the inflow of illegal timber. Given that the Sarawak State Government recognizes that illegal logging in the state is a serious problem, the continuous use of Sarawak plywood is highly likely to constitute a violation of indigenous peoples' human rights and direct involvement in illegal logging.

There is a fundamental and urgent need for all Japanese companies to review their policy on the procurement of timber.

2. Japanese Regulations

As described above, illegal timber from Sarawak is widely used in Japan. The inflow of illegally logged timber is permitted under Japanese regulations, lenient even when compared with those of other nations.

In 2000, Japan enacted what is known as the Green Purchasing Law [Official name: Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities (Act no. 100 of 2000)], hereafter GPL, which requires the government to endeavor to procure eco-friendly goods and services. A guideline developed by the Japanese Forestry Agency in 2006 was created in accordance with the GPL to set forth a series of verification methods to determine the legality of imported timber, labeled the "Goho-Wood System."¹⁴⁶ Under the Goho-Wood verification system, set up based on Japanese Forestry Agency guidelines, the government is required to provide proof that imported timber is legal, by proving that it was not illegally logged.¹⁴⁷ The guidelines promote the use of forest certification and an industry-organized verification system,¹⁴⁸ in which certification groups recognized by the industry organization verify that business is carried out according to the industry verification system.

However, the GPL has been subject to a number of criticisms. It does not provide for any enforcement or substantial penalties to ensure that Japanese importers are compliant with the law and its system.¹⁴⁹ The GPL applies

142 Id.

143 Answer to an inquiry by HRN.

144 Global Witness (supra, note 137).

145 Id.

146 "Developed Guideline for Verification on Legality and Sustainability of Wood and Wood Products", Feb. 2006, Forestry Agency ("Forestry Agency Guideline"), URL: <http://www.rinya.maff.go.jp/j/boutai/ihoubatu/pdf/gaido1.pdf>.

147 Japan Federation of Wood-industry Associations Council for Tackling Illegal Logging and Promotion of Goho-Wood "Goho-wood Handbook 4th edition" (2015), 13. ("Goho-wood Handbook"), URL: http://www.goho-wood.jp/ihou/handbook_k.pdf.

148 In order to provide wood and wood products verified as legitimate and sustainable, the operation based on the Forestry Agency Guideline began in 2006. Forest, forestry industry and timber industry related organizations (certifying group) created a voluntary code of conduct, and review/certify whether segregation management system and document management system are properly operated on applicant operators. The certified operators provide their customers with a document (a certificate) to show that the delivered wood and wood products are verified as legitimate and sustainable, and that they are managed under a proper segregation system. This certificate is issued at each delivery to create a chain of certification of legality and sustainability, which proves legitimacy and sustainability of the products. Japan Federation of Wood-industry Associations website regarding proof of legitimacy, URL : <https://www.goho-wood.jp/certification/>

149 In case of violation of the GPL, misstatement of the certificate is subject to other laws regarding accounting and may be subject to civil actions. Moreover, misconduct of corporations may be publicized through the certifying group's website. Goho-wood Handbook (supra, note 144), 26.

only to a limited number of cases, specifically, to procurement by national government agencies.¹⁵⁰ The GPL thus places an obligation to procure legal timber only on the public sector, and as such only applies to less than 5% of all timber consumption in Japan.¹⁵¹ Moreover, certain permit documents allowed under the Goho-Wood System as proof of legality have serious issues as outlined below.

“Legality” in the Goho-Wood System is defined such that “the timber to be procured should be harvested in a legal manner consistent with procedures in the forest laws of timber producing countries and areas.”¹⁵²

Therefore, timber is considered “legal” as long as the laws and procedures in the producing country are followed as a matter of form, and any substantive review on whether indigenous peoples’ rights were violated is not required. Furthermore, Japan does not possess an independent verification system, instead relying on assurances from the producing country government and private sector actors to determine legality for timber under the Goho-Wood System.¹⁵³

The two criteria for verifying the legality of timber imported from Sarawak are as follows:

- ① The seller guarantees the legality of the timber at the time of harvest; and,
- ② A third party such as an industry association or chain of custody certification body ensures the reliability of the seller’s guarantee¹⁵⁴

Both of these criteria are subject to monitoring on by the Sarawak state.

However, this monitoring does not properly function. The Sarawak Timber Industry Development Corporation (STIDC) in Sarawak, administered by the Sarawak government, monitors timber export processes, and an export document stamped and signed by STIDC is accepted as proof of legality.¹⁵⁵ However, as mentioned in Section III.3 (Government Corruption), STIDC has been criticized for its longstanding collusion with large logging corporate groups, widespread corruption, and for continuously issuing proof of legality even for illegal logging practices.¹⁵⁶ Therefore, STIDC is not an organization able to make legitimate judgments on the legality of timber, and any verification process allowing STIDC documents to serve as proof of legality must not be considered legitimate. Despite this, under the Goho-Wood System in Japan, Japanese domestic buyers are not required to independently verify the legality of purchased timber, even if there is a high risk of illegality in their supply chain. Therefore, even if there are potential violations of law, such as bribery or defaults in the payment of appropriate fees and taxes at the time logging licenses were allocated, Japanese timber industry organizations such as the Japan Lumber Importers’ Association and the Japan Federation of Wood-industry Associations accept STIDC-issued proof of legality without question, as long as STIDC also issued an export document stating that proper proof of legality exists.¹⁵⁷ For example, Japan Lumber Importers’ Association described the certification system of legality in Sarawak as follows:

[Sarawak’s legality verification system is] well-established and now efficiently working in that country, which is also monitored by the independent committee including the Japanese NGOs. The system fulfills the

150 There are some importers who voluntarily apply Goho-Wood System to the supply to private sector.

151 See the GPL Article 1 and 3.

152 Forestry Agency Guideline (supra, note 143), 2(1).

153 Id, 17.

154 Goho-wood system handbook (supra, note 144), 13.

155 Goho-wood system handbook (supra, note 144), 56.

157 ‘How Forestry Staff Write Their ‘Ground Reports’ From Seaside Hotels in KK,’ Sarawak Report, FEB 18, 2014, URL:

<http://www.sarawakreport.org/2014/02/forestry-department-write-ground-reports-from-seaside-hotels-in-kk-exclusive-expose/>

157 Global Witness (supra, note 3), 15.

*requirements of the Japanese Green Procurement Policy and has been widely accepted in the Japanese lumber industry for 7 years. We trust it obtains enough official validity to certify as legal in Japan.*¹⁵⁸

Under this inadequate definition of “legality”, it is impossible to prevent illegal acts stemming from corruption, and the violation of NCR is insufficient to extinguish the legality of a shipment of timber. It is under this insufficient definition of “legal” that timber which has been illegally logged and violates indigenous peoples’ rights is able to be imported in bulk.¹⁵⁹

As discussed above, the GPL and Goho-Wood System have failed to provide substantial checks and effective enforcement and penalties to halt illegal timber imports from Sarawak. As a result, these lenient Japanese regulations allow Japanese companies to purchase large portions of illegally logged timber, which exacerbates many extensive issues of concern remaining unresolved in Sarawak, such as violations of indigenous peoples’ rights, environmental destruction, and corruption.¹⁶⁰

3. UN Guiding Principles on Business and Human Rights

In 2011, the “Guiding Principles on Business and Human Rights” was adopted by the UN Human Rights Council. These principles rest on three pillars: protect, respect, and remedy, which include:

- The state duty to protect human rights;
- The corporate responsibility to respect human rights; and
- Access to remedy.

Under the principles, business enterprises should undertake the following actions in order to meet their responsibilities to respect human rights,¹⁶¹

- a) A policy commitment to meet their responsibility to respect human rights;
- b) A human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights;
- c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The human rights due diligence process should include assessing actual and potential human rights impacts of business activity, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed¹⁶². Also, the principles call for human rights due diligence to cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships,¹⁶³ and that the coverage extends into adverse effect arising in the broader corporate value chain in addition to that arising in the enterprise itself.¹⁶⁴

Moreover, this principle call on states to take the following actions:¹⁶⁵

158 Id at 16.

159 Id, at 16.

160 Id, at 19.

161 UN Guiding Principles on Business and Human Rights (“Guiding Principle”) Article 15.

163 Guiding Principle Article 17.

164 Id.

165 Guiding Principle Article 17 commentary.

166 Guiding Principle Article 3.

- a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

The current GPL and Goho-Wood System are also thought to be violating Article 3 of the Guiding Principles because, by relying only on the formality of Malaysian evaluations of legality, Japanese regulations lack a substantive and effective evaluation system for the human rights violations of business activities. Furthermore, many Japanese companies do not fulfill the human rights due diligence obligation provided in Article 17, as they continue their business activities despite relying on the formality of Malaysian evaluations of legality.

4. Policies of Other Countries

In contrast to Japan, the US, EU, and Australia—all developed nations importing large amounts of timber—have enacted more comprehensive and effective legislation and policies regarding illegal timber imports.

A) Regulations in the United States of America

Negative impacts on the US timber industry from importing illegal and cheap wood and wood products from the tropics partly led the United States to enact the world’s first ban on illegal harvested wood products, the 2008 Lacey Act.¹⁶⁶ The amended 2008 Lacey Act made it illegal to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant that was taken, transported or traded in violation of the laws of the U.S. or relevant foreign law.¹⁶⁷ The law declared it illegal to:

- (i) Violate any law or regulation that protects plants or that regulates the theft of plants, the taking of plants from an officially protected area, the taking of plants from an officially designated area and the taking of plants without required authorization,
- (ii) Not pay appropriate taxes or fees, and
- (iii) Violate any limitation regarding the export or transshipment.¹⁶⁸

Furthermore, in an effort to promote transparency and accountability, the Lacey Act requires importers to declare the scientific names of tree species used in a product, the country of harvest, the quantity and measure of the product, and the value of the product.¹⁶⁹ Requiring that importers provide this basic information helps ensure the importing companies know where the wood is coming from, and it enables the U.S. government to enforce the law.

166 See e.g., Mari Kasui (Representative of Deep Green Consulting), “Regulations against import/distribution of illegal timbers are tightened in the US and the EU~The amended 2008 Lacey Act~” (Fairwood Mail Magazine Vol.42, (Dec. 9th 2010), URL: http://www.fairwood.jp/news/mmbn/mmat/vol042_1.html

167 The Lacey Act, 16 USC §3372(a)(2), URL: http://www.aphis.usda.gov/plant_health/lacey_act/downloads/background--redlinedLaceyamndmnt--forests--may08.pdf

168 Id, 16 USC §3372(a)(2)(B).

169 Id, 16 USC §3372(f)(1).

Alongside comprehensive legislation and promotion of accountability, the Lacey Act subjects violators to harsh punishments. Under the 2008 Lacey Act, penalties for illegal timber transactions differ depending on whether the act was intentional. Intentional violations can lead to criminal penalties up to US\$500,000 for organizations (up to US\$250,000 for individuals) or up to five years imprisonment, confiscation of the products, and penalties of twice the amount of unjust enrichment. In case of unintentional violations, penalties vary depending on whether “due care” was exercised. Without “due care,” penalties can amount up to US\$200,000 for organizations (up to US\$100,000 for individuals) or penalties of twice the amount of unjust enrichment, confiscation of the products, and/or up to 1 year imprisonment or civil penalties up to US\$10,000. On the other hand, if “due care” was properly exercised the products would be confiscated but no other sanctions would apply. “Due care” is a flexible concept developed through common law in the U.S. and is understood as the degree of care which an ordinary prudent person would exercise. As a court’s interpretation of “due care” is obscure, it is wise for a company to utilize its wide range of technologies and resources to reduce illegal timber in its long and complicated supply chain. Although the Lacey Act is not document-based but fact-based in its application, a robust third-party certificate and audit system is considered to be an important method in exercising “due care.”

B) Regulations in the EU

The EU has established comprehensive legislation on timber imports through the European Union Timber Regulations (EUTR) under the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan to ensure broad coverage, effective measures, and strong enforcement. The EUTR requires illegality to be assessed by taking into consideration the legislation of the country of harvest concerning, among other things, third parties’ legal rights to land that is affected by the timber harvesting.¹⁷⁰ Furthermore, the EUTR also enforces a due diligence system that operators, including those in the private sector, shall exercise.¹⁷¹ The due diligence system shall include the following elements.¹⁷²

- a) The measures and procedures to provide access to the following information about the sources and suppliers of the timber and timber products being placed on the market; countries of harvest and where applicable, sub-national regions and concessions of harvest; trademark and species the product contains, common name and if applicable complete scientific name of timber species; quantity (expressed in volume, weight or number of units); name and address of the direct supplier to the operator, name and address of the trader to whom the timber and timber products have been supplied; and documents or other information indicating compliance of those timber and timber products with the applicable legislation.
- b) The risk assessment procedure that allows operators to analyze/evaluate the risk of illegally logged timbers or products made of illegal timbers being placed on the market. Besides the information described in a), the following relevant risk assessment criteria need to be taken into account: assurance of compliance with applicable legislation; prevalence of illegal harvesting of

170 REGULATION (EU) No 995/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Art 2, Item (h), URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010R0995&from=EN>

171 Id.

172 Id, Preamble, para.17.

specific tree species; prevalence of illegal harvesting or practices in the country of harvest and/or sub-national region where the timber was harvested; sanctions imposed by the UN Security Council or the Council of the EU on timber imports or exports; and complexity of the supply chain of timber and timber products.

- c) Risk mitigation procedure (unless the risk is considered to be “negligible”). In this procedure, appropriate and balanced measures and procedures need to be introduced in order to efficiently minimize the risk so additional information, documents or the third-party certification may be required.

Other than comprehensive regulations, the EU has also established strict and clear penalty rules to ensure that companies abide by the laws. The EUTR requires that each member state establish and apply penalties that are “effective, proportionate and dissuasive” that may include the seizure of timber products, an immediate suspension of authorization to trade, imprisonment, and fines that are proportionate to damages and losses.¹⁷³

The EU has been promoting the establishment of bilateral agreements called the Voluntary Partnership Agreements (VPAs) as another measure of the FLEGT Action Plan. This is to ensure the legality of timber exported to the EU through the establishment of a timber legality assurance system by exporting countries.¹⁷⁴ The EU and Malaysia started negotiations for the VPA in 2007. The two parties, however, have not come to an agreement yet.¹⁷⁵ It has been suggested that the main reason behind their disagreement is the fact that the State of Sarawak has refused to join in the negotiations, claiming that it finds no value in joining forces with the other party because its main market is outside of the EU.¹⁷⁶

C) Regulations in Australia

Inspired by the EU’s Timber Regulation and the United States’ Lacey Act, in 2012 the Australian government established the Australian Illegal Logging Prohibition Act 2012 (the Act), which makes it an offense for Australian importers to place timber or timber products in the Australian market that have been harvested in contravention of the laws in the country of origin.¹⁷⁷ Additionally, although verification of the legality of timber products in transactions with Sarawak is left to STIDC, Australian companies are required to conduct due diligence, taking indigenous peoples’ rights into consideration.¹⁷⁸ Under the Act, criminal sanctions could be up to five years imprisonment and/or up to AUD\$85,000 of penalties for individuals, or up to AUD\$425,000 for companies or corporate bodies.¹⁷⁹ Furthermore, since November 30, 2014, the products are confiscated even for unintentional violations, and penalties for violations of due diligence obligations could be up to AUD\$51,000 for individuals and up to AUD\$255,000 for companies.¹⁸⁰

173 Id, art. 19, para1-2.

174 'All You Need to Know about the US Lacey ACT, EUTR, and the Australian Illegal Logging Prohibition 2012,' retrieved on June 29, 2015, URL:

<http://www.euflegt.efi.int/documents/10180/23025/All+you+need+to+know+about+the+US+Lacey+Act+%20the+EU+Timber+Regulation+and+the+Australian+Illegal+Logging+Prohibition+Act+2012/b30e8b52-f093-448d-be57-9ae7677259f1>, 11.

175 Hoare (supra, note 19), 12.

176 See, e.g., Yu Ji, ‘EU hopes to get Sarawak on board Voluntary Partnership Agreement,’ The Star Online, November 16, 2013, URL: <http://www.thestar.com.my/News/Community/2013/11/16/Countering-illegal-timber-trade-EU-hopes-to-get-Sarawak-on-board-Voluntary-Partnership-Agreement/>

177Illegal Logging Prohibition Act, No. 166, 2012 An Act to combat illegal logging, and for related purposes, §§7, 8(b), URL: <https://www.comlaw.gov.au/Details/C2012A00166>

178 Id. §15.

179 Id. § 8- § 10.

180 Id.

D) Comparison between Japan and Other Countries

As discussed above, legislation and policies in the United States, EU, and Australia are more stringent against the import of illegally logged timber than those of Japan.

In short, while in Japan no penalties are imposed against private sector operators importing illegally logged timber, the United States, EU, and Australia impose harsh criminal sanctions on law-breaking companies.

Moreover, under the Goho-Wood System in Japan, importers can rely entirely on the documentation provided by a branch of the harvest country's government. Even where there is a high risk of illegality, no further precautions, such as additional investigations, are required. In contrast, in the United States, EU, and Australia, the private sector is required to conduct due diligence throughout the supply chain, and as a result, private sector actors are required to minimize the risk of illegality once it becomes apparent.

Furthermore, the EU explicitly stipulates that the legislation of the country of harvest regarding NCR must be considered when assessing timber illegality. In the United States and Australia it is also expected that such legislation will be considered in assessing illegality. However, under the Japanese Goho-Wood System, the definition of legality is ambiguous, and only recognizes the legislation concerning forestry in its considerations of legality; thus, the violation of indigenous peoples' NCR is not explicitly considered.

Given this situation, Japan is recognized as one of the markets with particularly lax regulations, along with India and China.¹⁸¹ That the Sarawak government and the timber industry in Sarawak have not actively controlled illegal logging can be attributed to the fact that their major trade partners are markets with lenient regulations. If Japan, which is the largest importing country of timber and timber products from Sarawak, tightened its regulations and required thorough due diligence, the Sarawak government would no longer be able to disregard the problem of illegal logging.¹⁸²

181 See, e.g., Hoare (supra, note 19), 20-21 and Yu Ji (supra, note 173).

182 According to a recent news report, the Japanese government intends to introduce a new law obligating private companies to confirm the legality of timber. Mainichi News Paper, "Illegal logging: the Liberal Democratic Party plans to implement a new law to impose obligation on private operators (July 3rd 2015), URL: <http://mainichi.jp/select/news/20150704k0000m020079000c.html>

VII. Recommendations

HRN found that there are grave human rights infringements against indigenous peoples in Sarawak, Malaysia. Deforestation in Malaysia is regulated under a licensing system administered by the government, under which indigenous peoples' rights are supposed to be protected. However, the fact that illegal logging is not adequately policed and that the Sarawak government has, in collusion with logging companies, issued logging licenses recklessly in violation of indigenous peoples' rights show that such regulations are ineffective in protecting the rights of indigenous peoples. As a consequence of illegal logging, forests in Sarawak are actually shrinking, and this is severely affecting the sustainability of indigenous peoples' lives and their survival.

Furthermore, the measures taken by Japan, the largest importer of Sarawak timber, is inadequate. The Japanese government does not effectively regulate the import of illegal timber, and Japanese companies continuously trade with local companies known to conduct illegal logging in Sarawak, failing to check the legality of logging processes of the timber they import.

HRN thus submits the following recommendations in order to protect indigenous peoples' rights in Sarawak.

1. To Japanese Corporations

- A) Immediately cease trade with logging companies engaged in illegal logging in Sarawak, including Samling Global and Shin Yang group.
- B) Without waiting for the reform of regulations, conduct thorough due diligence on the supply chain of imported timber and timber products, and establish a system that enables the industry to self-monitor for illegal logging.
- C) Implement or amend a CSR policy which places great value on the preservation of the environment and respect for human rights, and keep all group companies and trading partners informed of the contents of the policy.
- D) Hold continual dialogues with NGOs and indigenous communities to obtain accurate information regarding illegal logging.

2. To Local Corporations

- A) Immediately cease illegal logging
- B) Regardless of whether a logging license has already been issued, commence logging only after confirming free, prior and informed consent to logging by the affected indigenous peoples.
- C) Establish a compliance structure to prevent illegal conduct, such as logging in violation of forest related regulations and licensing terms, or being involving in corruption
- D) Implement or amend CSR policies such that they place great value on the preservation of the environment and respect for human rights, and keep all group companies and trading partners informed of the contents of the policy.

3. To the Japanese Government

- A) Revise relevant laws and regulations to completely ban imports of illegally logged timber and impose criminal sanctions on violators.
- B) Impose an obligation to conduct effective due diligence regarding the import of timber and timber products.

C) Revise relevant laws, regulations, and guidelines to explicitly state that, in determining the illegality of timber imports, a wide range of laws and regulations (including international human rights law) must be considered, including those regarding corruption and infringement of NCR.

4. To the Malaysian Government and Sarawak State Government

- A) Strengthen regulations regarding illegal logging and accelerate detection of corruption in relation to illegal logging.
- B) Amend laws and regulations to recognize NCR for land used for hunting, fishing, logging, and gathering, and make rapid progress in the registration of NCR.
- C) Increase the level of oversight over logging companies by requiring free, prior and informed consent from affected indigenous people prior to the issuance of logging licenses.
- D) Amend regulations or improve the operation of existing laws in accordance with the recommendations published in the April 2013 SUHAKAM report regarding NCR.

/End/