

This Project Was Funded by:

AAK

FACILITATED LAND APPLICATION PROCESS

Report to the Jurisdictional Certification Steering Committee (JCSC)
Draft Version 3.0 Revised on August 30th, 2019



SABAH

LAND ORDINANCE

(Sabah Cap. 68)

Together with the Subsidiary Legislation
made thereunder

Printed by the Government Printer with the authority of the
Commissioner of Law Revision, Sabah, under Section 3 of
the Statute of Law Revision, 1961 (No. 61/1961) and
commencing the 1st day of July 1977.



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With fieldwork from the Forever
Sabah CSPO Team and oil palm
smallholders

ABOUT THIS GUIDE

The Facilitated Land Application Process (FLAP) prototypes a way of facilitating smallholders to address with relevant government agencies and other parties issues with their untitled land planted with oil palm.

FLAP was developed for the Jurisdictional Certification Steering Committee (JCSC) to help Sabah meet the State Government's Jurisdictional Certification commitment to achieve Malaysian Sustainable Palm Oil (MSPO) and Roundtable for Sustainable Palm Oil (RSPO) standards by 2025. FLAP is needed because Sabahan smallholders experience land tenure problems. In the 20 pilot villages in the four districts of the TTBK only 22.5% of smallholder plots have legally recognized land title. The Jurisdictional process seeks to address this because:

- MPOB Registration for MSPO requires land title (or LA with LSD support letter); 33% of smallholders in TTBK were not registered with MPOB in 2018;
- RSPO Certification requires legal documentation of title or recognized customary (adat) tenure; nearly 79.14% of smallholder plots in TTBK cannot currently meet this standard;
- Among the 20 villages surveyed in TTBK none had no unresolved land issues;
- Resolving land claims is a top motivation for smallholders engaging in the JC process;
- Smallholder yields are low, secure tenure is known to increase productivity, and if titling LA land could increase yields by 10% it would add RM 150m to Sabah's economy.

The studies reported here found many different causes of land rights challenges in the TTBK, the largest of which is unprocessed Land Applications on native customary land or territory; other issues include conflicts with other title holders (estate and community) and plots in Forest Reserves and Riparian zones. We describe strategies to bring solutions to three broad categories of land tenure problems, including on re-establishing native customary and user rights (NCR).

How does this guide work?

- i. This guide disseminates information about smallholders' land tenure problems and rights to help develop systematic solutions.
- ii. Provides strategies towards resolution of issues in line with RSPO's Malaysia National Interpretation Requirements (MYNI 2014) and the Sabah Land Ordinance (1930).
- iii. Identifies procedures and approaches to collate the comprehensive documents needed for review and verification by the authorities and/or stakeholders to establish tenure.

What are the limitations of FLAP and this Guide?

- a) This guide does not provide solutions for all types of land issues in Sabah's palm oil production landscapes, as specifics vary on a case-by-case basis.
- b) Approval of land title and NCR applications are at Lands & Surveys Dept. discretion.
- c) This guide works to resolve the issues of smallholders who have legitimate rights according to the related set of laws and regulations discussed in this guide. Other solutions will be needed for cases where smallholders lack solid claims to their land.

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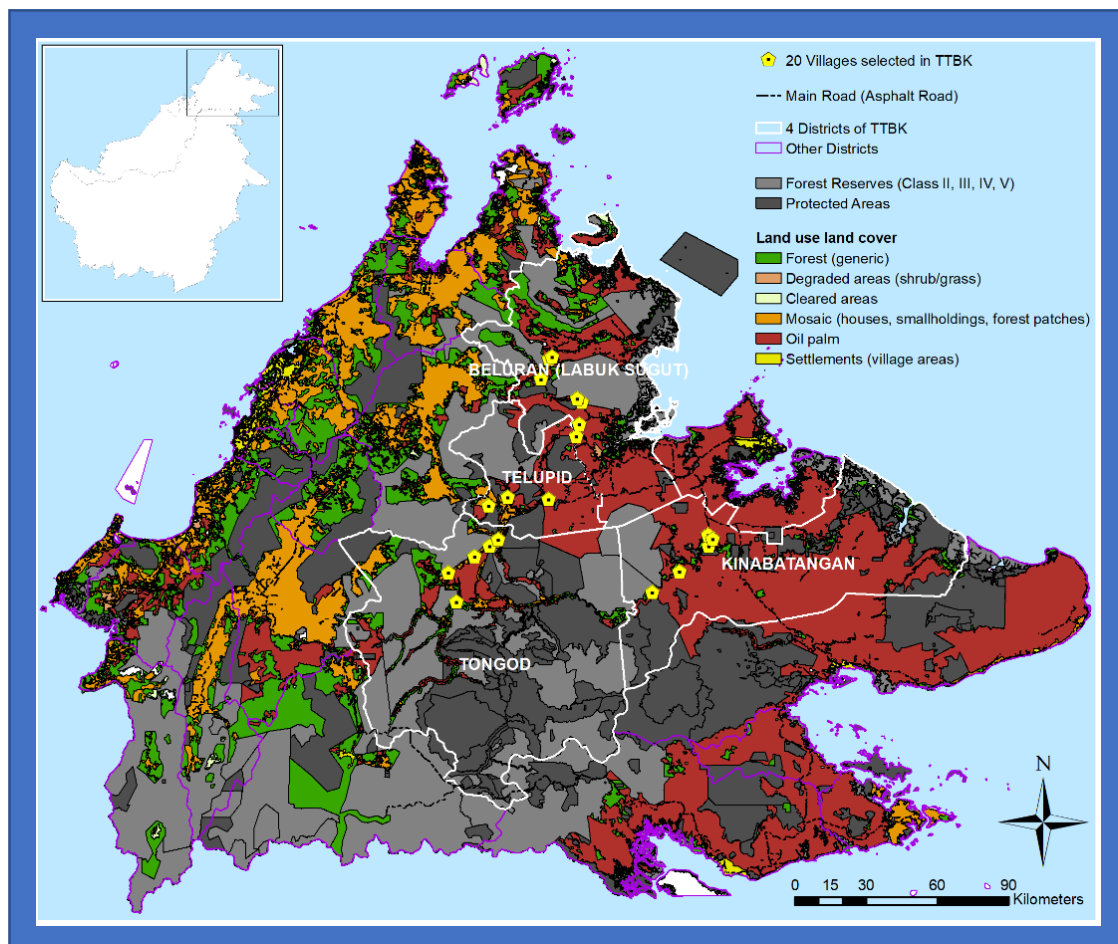
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Oil Palm Smallholders' Land Tenure Issues in TTBK: Methodology and Findings

1.1 Introduction

The Facilitated Land Application Process (FLAP) was designed based on data gathered from 20 villages situated in four contiguous districts of Sabah (Tongod, Telupid, Beluran and Kinabatangan, or the TTBK). These districts represent diverse situations faced by smallholders from the overall 25 districts of Sabah. They were chosen by the Jurisdictional Steering Committee (JCSC) as a pilot area to develop the jurisdictional process, including for Forever Sabah' Certified Sustainable Palm Oil (CSPO) initiatives. The FLAP project built upon the work in these districts by the CSPO and FPIC Teams, bringing staff's long experience with land issues to these same 20 villages.

Figure 1: Map of Sabah Showing Selected TTBK Villages



(Map Source: CSPO Team, Wilson *et al.*, 2018)

1.2 Methodology for Developing the FLAP Approach

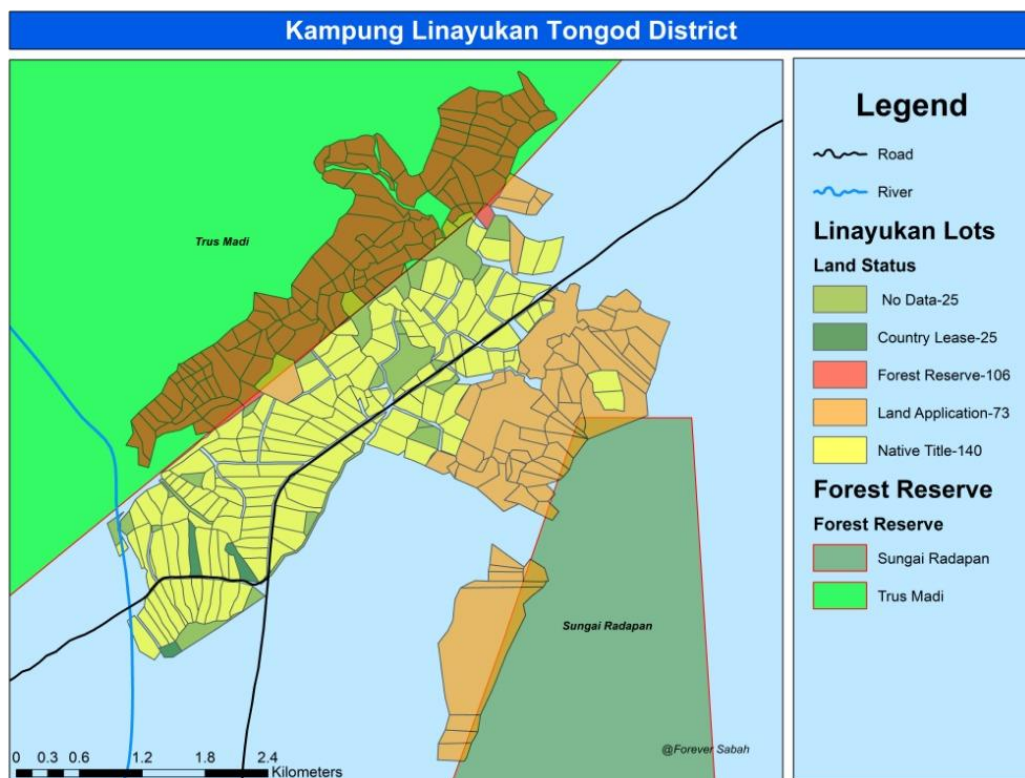
(a) Survey and Secondary Data

The FLAP Team built on Forever Sabah's CSPO Team survey data gathered for the report entitled *Smallholder Readiness for Roundtable on Sustainable Palm Oil (RSPO) Jurisdictional Certification of Palm Oil by 2025*. In that study, Forever Sabah surveyed 134 households who are planting oil palm from the same 20 villages in these TTBK districts. The FLAP Team also gathered secondary data on land issues in TTBK districts from the documents of governmental agencies, research articles as well as other reports published by Forever Sabah, and drew upon long experience at PACOS and other agencies with smallholders' customary land tenure and living conditions (see Appendix E) and the insecurity of customary land tenure (see Appendix F).

(b) Mapping

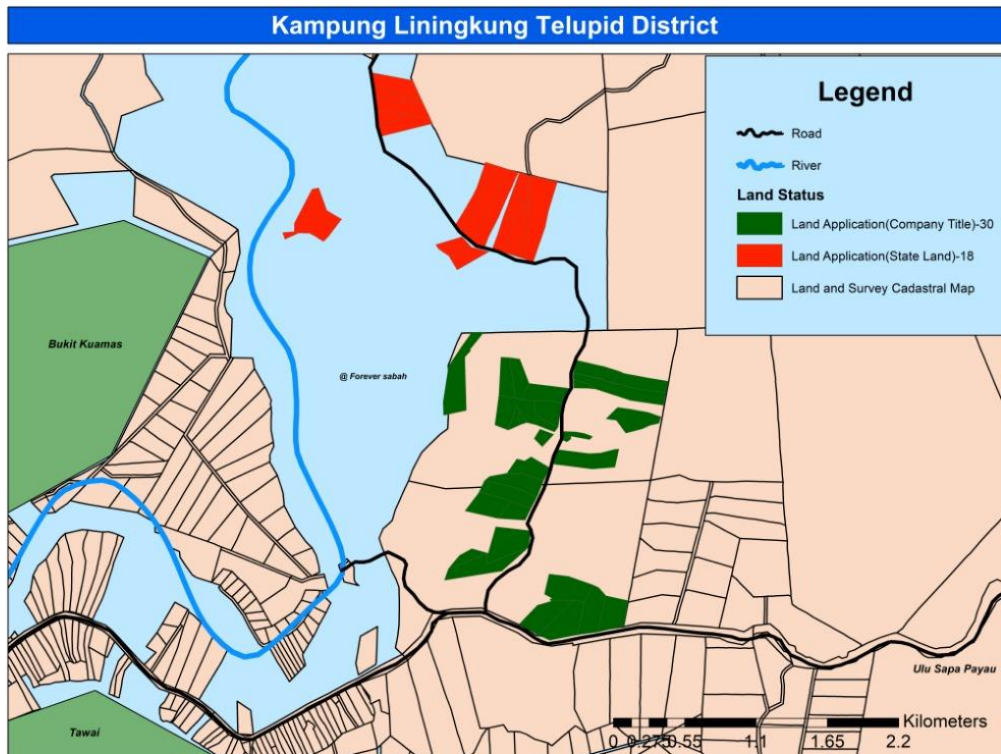
The distribution of the land holdings of each village was mapped by the villagers in partnership with the Forever Sabah CSPO Team, and overlaid upon the Lands & Survey Dept. cadastral maps (see two examples below). This process surfaced many land issues, including, for example, the presence of plots wholly or often partly in Forest Reserves or Riparian zones. These maps often identified issues and details not fully documented by the earlier surveys and interviews. Satellite images were also used to assess smallholder clearance in Forest Reserves.

Figure 2: Map of Kampung Linayukan, Tongod District



(Map Source: CSPO Team)

Figure 3: Map of Kampung Liningkung, Telupid District



(Map Source: CSPO Team)

c) Individual Interviews

Interview sessions with respondents were conducted both by individual and by group. Individual interviews were conducted with respondents who are knowledgeable with regards to smallholders' land tenure in the kampung. These respondents consist of the headman or the community leaders, smallholders who were experiencing land disputes and Forever Sabah personnel who are working with smallholders in TTBK districts. Each interview was conducted informally and unstructured. Information given by respondents was recorded via written notes.

d) Village Group Interviews

For group interviews, villagers in TTBK districts were invited to attend meetings to discuss land issues in their kampungs. The meetings were held in centralized locations. Overall people from a total of 15 kampungs from TTBK districts attended the first round of meetings. During these meetings, villagers were presented with a map showing land parcels in their kampungs. Instruments such as computer and 'mahjong papers' were used to display the maps in order to obtain better data on land dispute locations and time frames. All maps displayed were obtained from Forever Sabah's sketch maps and also available official online data from <http://jtuwma.net>. After that, the facilitators of the meeting asked probing questions to the villagers and responses recorded via written notes. Follow-up meetings were held with the 5 kampungs not included in the first round of meetings, in order to gather similar data.

(e) Direct Observation

For direct observation, facilitators stayed overnight with the villagers who have overlapping land claims with other smallholders, making field observations regarding the villagers' land rights. Information obtained was documented via field notes and pictures were taken.

(f) Data Quality and Integrity

Land issues are complex, and often not transparent. Interview data, including that reported in earlier studies by our team, has a tendency of bias, and over-reports the recognition of rights and under-reports, for example, presence of plots within designated Forest Reserves. With time, more data sources and deeper relationships it is possible to get a fuller understanding of the facts. Drawing upon the above data sources we were able to assign status on 95% of all plots mapped, the only major gap now being three villages in Telupid where LA village claims are on a single block basis so it is unclear how many plots are present.

1.3 Land Tenure Challenges in TTBK

FLAP study core findings (Table One) indicate that smallholders in Sabah face accumulated severe land tenure issues deserving of significant attention.

- Less than half of the sample villages have any plots with Native Title or other secure land registration; lack of recognized tenure and land conflicts are a problem in every village studied;
- Only 20.86% of plots on cadastral maps (and only one-third of plots described in farmer interviews) were registered or titled;
- Over half of all plots are Land Applications that are unprocessed, or incompletely processed by the Lands & Surveys Dept., many stretching back over 10 years;
- Around 23.48% of plots are wholly or partly in Forest Reserves (mostly Class II Commercial Forests); If Bonggaya Forest Reserve is de-gazetted the % falls to 18.74%
- Many villages have conflicts among smallholders, with neighbouring villages, and with private land owners, but fortunately these involve a modest number of plots;
- An estimated 1.22% of plots are bisected by waterways that require riparian reserves.

The pattern of conflicts varies greatly between villages, as indicated in Table Two, where the conflicts experienced in each village are listed in importance based on interviews with the local authorities as well as through participatory mapping and discussions with smallholders.

Lack of secure tenure and an inability to solve land conflicts (whether large or small) as they come up is a problem for the farmers and for the environment: insecurity of tenure is associated with feeling vulnerable and low levels of investment in production and land care. It is also a major problem for the society as it creates instability, risk of conflict, and propensity to political patronage. And it is, of course, not acceptable under MSPO & RSPO standards. Resolving the land tenure problem in an equitable manner will almost certainly lead to increased yields because smallholders will invest more in improving production when they are assured of the benefits; even an increase of just 5-10% in yields would amount to

tens of million ringgit that could be gained annually by the state economy to the benefit of many of its poorest citizens.

The smallholder tenure problem has been recognised for some time by field researchers. For example, a study published in 2012 on growers in the TTBK concluded:

Oil palm in Sabah is grown in large plantations or smallholdings, the latter mostly managed by indigenous peoples on untitled customary land. Government development agencies have long focussed on improving the productivity of smallholders for poverty alleviation. For most smallholders, the main issue is tenure insecurity: as long as lands remain untitled they are subject to changes in land allocation and land use at the discretion of the State Government. Indigenous claimants seek recognition of the right to use and occupy ancestral lands via individual Native Titles (NT), as provided for in the Sabah Land Ordinance (SLO) (Majid Cooke, 2012).

The finding that LA is a major issue also matches the Public Hearings reported by the Human Rights Commission of Malaysia (2013), where the most common issue that could affect Native Land Rights was identified as slow processing of land title applications. This issue was described as an administrative factor because the Land Application (LA) approval process involves many steps and is also subject to comments from many governmental departments. Moreover, the process of approving a Land Application (LA) requires the Land Utilisation Committee (LUC) that consists of 12 governmental departments to find time for a meeting.

In addition to unprocessed LA, the Team recorded seven other types of disputes or conditions where local communities claimed land rights for plots cultivated with oil palm but in contested circumstances. These are: (1) plots opened in established Forest Reserve, (2) existing plots included in an expanded Forest Reserve boundary, (3) plots in designated Riparian Reserves, (4) plots on company's land (titled), (5) plots on another individual's land (titled), (6) plots on other smallholder communities' land (NCR), and (7) plots on land already surveyed, where title numbers have been produced, but smallholders have not received the land title. During the data collection process, we did not undertake detailed investigations into each claim but rather we adopted a participatory process to identify types of dispute and the actual status of the community's untitled land. The details and legitimacy of these claims can be addressed in future with relevant government agencies, once the JCSC has reviewed these findings and methodologies and provided guidance on a way forward.

The challenges and disputes uncovered in this report are already well known by Sabahans, but their frequency appears under-appreciated. Most concerning, the slow speed at which they are being resolved by current mechanisms is damaging smallholder production and their community life and is an obstacle to Certification. New mechanisms are needed to assist the Lands & Surveys Department, Sabah Forestry Department and other competent authorities to solve these issues effectively and rapidly and in line with Sabah's Land Ordinance and accumulated land law. The FLAP process proposes that this is achieved through facilitating the systematic gathering of information from relevant parties and supporting the processing

or resolution of claims and disputes by engaging the relevant parties to focus on solutions within Sabah's existing legal and cultural frameworks. The Team believes that the deployment of Native Customary Rights framework can make a significant contribution to achieving this.

The RSPO Principles, Criteria and Indicators (PC&I), refer specifically to the respect of NCR or user rights on the land and provide guidance for determining the validity of native claims over land. Criteria for claims of customary and user rights in Malaysia are shown in Box 1.

Box 1: Criteria for Claims of Customary & User Rights RSPO, Malaysia Interpretation

Customary and user rights claims will be potentially accepted for investigation only if the claimants fulfill all three of the following criteria:

1. Citizen of Malaysia or persons meeting the criteria to be a Malaysian Citizen by registration; the persons involved, or their parents, grandparents or great-grandparents, were born within Malaysia before Malaysia Day (16 September 1963); member of an ethnic group indigenous to the State within which they are claiming rights (refer to Article 161A(6)(b) of the Federal Constitution in relation to Sabah).
2. Their lineage must be provable, that is: the individuals making claims must be able to demonstrate a geographical, historical and cultural connection to the specific area over which their claim is made.
3. Claimants must demonstrate that they maintain either regular, or periodic, or seasonal, or repeated or intermittent use of the land area over which the claims are made.

(Source: Extracted from Malaysia National Interpretation of RSPO PC&I, 2014)



Community taking the GPS point of their land boundary marker

Table 1: The Nature of Land Tenure Issues with Oil Palm in TTBK Sample Villages

No.	Classification of Land	Land Tenure Issues	Percentage of TTBK sample Villages with this issue	Percentage of Palm Oil Plots with this issue	Percentage of Palm Oil Land Area with this issue
1	State Land & Native Customary Land Rights (NCR)	Unprocessed Land Application	90%	51.18%	54.45%
		Registered Survey Paper (advanced stage of LA)	15% (according to smallholders) 5% according to LSD	0.7% (according to smallholders) 0.1% according to LSD	0.1% 0.1% according to LSD
		Smallholders' land overlaps with other villager's land	15%	Unknown	Unknown
		Title numbers produced/not received (<i>Skim Rancangan Pekebun-pekebun Kecil Di Trusan Sapi</i>)	5%	2.32%	3.28%
		Smallholders' village boundaries overlapping with other village boundaries	5%	Unknown	Unknown
2	Forest Reserve	Establishment and expansion of Forest Reserve boundaries	50% (35% without Bonggaya)	23.48% (18.74% without Bonggaya)	17.99% (13.07% without Bonggaya)
3	Titled land	Company's land/concession	55%	2.07%	3.39%
4	Riparian Reserve	Riparian Reserve (impacting part of a plot)	50%	1.22%	Unmeasured
5	Gazetted by Government	Jabatan Perkhidmatan Veterinar Sabah for government use	5%	Unknown	Unknown
6	Titled Land	Nearly all successfully registered and titled land is under Native Title	40%	20.86%	18.99%
7	Unknown	Field and Lands & Surveys. data missing on some land	40%	4.79%	3.42%

(Sources of Data: Forever Sabah's 2017-2018 TTBK Survey; FLAP Village Meetings; Village Land Mapping by CSPO Team overlain on Lands & Surveys Dept. Maps. In three villages en bloc LA claims prevent plot analysis (Kg. Kopuron, Malapi and Tarasak in Telupid District). Note that percentages add up to more than 100% because of overlapping categories.)

Table 2: Village Level Land Tenure Issues

District	Village Name	Land Tenure Issues Reported
Telupid	Kg. Kopuron	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • 1970s Govt. Land Development Scheme (Rubber) with people from all over Sabah, both official and unofficial • Expansion of Forest Reserve Class 1 (Ulu Telupid) boundaries • Other villager's NCR
	Kg. Malapi	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve Class 1 (Lipaso) • Gazetted Land (Veterinary Dept); granted by previous leadership from another kampung
	Kg. Liningkung	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Company Land (Syarikat Kamsiah, and an individual mid-size producer, Tengku Ariaiah)
	Kg. Tarasak	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Company's land (IOI & Sabah Palm) • Riparian reserve
	Kg. Bakong Bakong	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • 26 out of 38 participants of <i>Skim Rancangan Pekebun-pekebun Kecil Di Trusan Sapi</i> have not received land title (unfulfilled "Offer Titles"). • Riparian reserve
Tongod	Kg. Langkabong	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve Class II (Trus Madi) • Company's land (KPD/Kim Leong)
	Kg. Linayukan	<ul style="list-style-type: none"> • Forest Reserve Class I (Sg. Radapan) & Forest Reserve Class II (Trus Madi) • Unprocessed Land Application (LA)
	Kg. Semundoh	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Land already measured, title numbers produced, but smallholders have not received the land title. • Riparian reserve
	Kg. Maliau	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve Class II (Trus Madi) • Riparian reserve
	Kg. Tampasak	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve Class II (Sg. Mangkuwagu) • Company Land (Mutu Sejahtera) • Riparian reserve
Beluran	Kg. Cenderamata	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve Class II (Bonggaya) – recently de-gazetted & allocated to private owner (Arus sawit), plots being surveyed, this shifted dispute to private company, but this may now be settled • Land already measured, but smallholders have not received the land title.

	Kg. Rancangan Cocos	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve Class II (Bonggaya) – recently de-gazetted & allocated to private owner (Arus sawit), plots being surveyed, this shifted dispute to private company, but this may now be settled
	Kg. Rungus Baru	<ul style="list-style-type: none"> • Forest Reserve Class II (Bonggaya) – stated recently de-gazetted to local small-medium sized private owner, shifting dispute • Disputes with other villagers’ land boundaries
	Kg. Dampiron	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve Class II (Lingkabau) • Riparian reserve • Company Land (Ester Muncul Maju)
	Kg. Melapi	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Riparian reserve • Company’s Land (Sayung Mas)
Kinabatangan	Kg. Sinar Jaya	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Company’s Land (Syarikat Global Shd Bhd) • Other villager’s NCR • Riparian reserve
	Kg. Kasih Sayang	<ul style="list-style-type: none"> • Unprocessed Land Application (LA); but indication of LSD survey soon
	Kg. Muhibah	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Expansion of Forest Reserve boundary • Company land (Borneo Samudera) • Riparian reserve • Other villager’s NCR
	Kg. Sangau	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Company land (Sarimo/IOI) • Riparian reserve
	Kg. Balat	<ul style="list-style-type: none"> • Unprocessed Land Application (LA) • Forest Reserve • Riparian reserve

(Sources of Data: FLAP fieldwork, CSPO Mapping & Forever Sabah’s 2017-2018 TTBK Survey)

1.4 Forest Reserves and Smallholder Oil Palm

Among the twenty villages sampled in TTBK we found 1,345.61 hectares of plots in seven Forest Reserves, including three Forest Reserves in Class One (Totally Protected) and four in Class Two (Commercial Forests) which together have a total area of 260,071 hectares. (See Table 3 below for details). It is reported that Bonggaya Forest Reserve has recently been de-gazetted and allocated to private companies. If this is the case the area cleared in current Forest Reserves by smallholders is reduced to 1,115.61ha. The villagers claim Native Customary Rights over these plots in what are now state forests; claims with varying levels of complexity and legal legitimacy, which are not addressed by this report. In some of the Forest Reserves (e.g. Lipaso), significant proportion of the land cleared is for rubber rather than oil palm.

The level of smallholder presence in Forest Reserves is not substantial (an average of only 0.52-0.56% of the Forest Reserves in question have been cleared by the sample villages; rising to 2.66% when clearance by all villages is taken into account in a sample of three impacted Forest Reserves, namely Lipaso, Ulu Telupid and Mangkuwagu). However, the Sabah Forest Department has to be concerned that recognition of these particular land claims could in some cases lead to further claims and encroachment that might reach environmentally threatening levels. Furthermore, Forest Reserve land cannot be converted to oil palm and then be RSPO certified. The current sample methodology is not suited for calculating the level of Forest Reserve encroachment in the TTBK as a whole, a calculation made more complex by the fact that the number of villages recognized by District Offices varies significantly from that listed by Lands & Survey, and both these numbers are different to the number of settlements observable on satellite images (Spaces and Forever Sabah data), and the numbers known and visited by CSPO staff. For example in Telupid District local government recognizes 18, Lands & Survey 27, and CSPO/Forever Sabah, 40; in some districts these differences are caused by inclusion in some sources of oil palm worker settlements. We estimate, however that between 10,000 and 20,000 hectares of gazetted Forest Reserve (all classes included) have been cleared in the TTBK for oil palm and other use by smallholders. More accurate numbers would require analysis of satellite data for all or most of the TTBK Forest Reserves. The details for solutions may vary between options in totally protected Forest Reserves (Class One), and those for commercial forests under long term leases to private forest companies with logging and tree plantation management plans (Class Two).

Table 3 Levels of Clearance of Forest Reserves

Forest Reserves	Class	Total Area (Ha) (2015)	Sample Villages Involved	Hectares Converted by Sample Smallholders	% Converted by Sample Smallholders	Other Smallholder Oil Palm Encroachment	% Converted by Other Smallholders	% of Forest Reserve Converted
Lipaso	I	3,606	Malapi	14.99	0.42	118.69	3.29	3.71
Sungai Radapan	I	7,702	Linayukan	146.14	1.90	Not Measured		-
Ulu Telupid	I	6,460	Kopuron	7.62	0.12	61.98	0.96	1.08
Bonggaya	II	61,514	Cenderamata, Rancangan Cocos & Rungus Baru	230.00	0.50	Not Measured		-
Lingkabau	II	71,293	Dampiron	138.00	0.19	Not Measured		-
Sungai Mangkuwagu	II	8,335	Tampasak	179.10	2.15	86.65	1.04	3.19
Trus Madi	II	101,161	Langkabong, Linayukan & Maliau	629.76	0.62	Not Measured		-
TOTAL (w/o Bonggaya)		198,557		1,115.61	0.56	267.32	1.76	2.66
TOTAL		260,071		1,345.61	0.52	458.00	1.76	2.66

Sources: FLAP/CSPO Field surveys and cadastral maps, analysis of satellite imagery. Size of Forest Reserves based on SFD 2015 report.

While current level of smallholder presence in gazetted Forest Reserves is low (never more than 4%) overall some 23.48% of smallholder plots and 17.99% of plot land area are in Forest Reserves (14.92% total land area if Bonggaya Forest Reserve is considered degazetted) and more importantly a small proportion of villages (20-35%) are significantly (above 25%) or highly (above 50%) dependent on lands in Forest Reserves for their production and livelihoods (see Table Below). A transition out of oil palm in Forest Reserves

in these particular villages would require effective external investment in alternative livelihood options. Meanwhile it needs to be noted that most of the oil palm plots inside Forest Reserves are not particularly productive for reasons of slope, pool soil (including due to ultramafic geology), and low levels of management investment. Alternative livelihoods and land-use systems are needed to replace oil palm plantations in these areas with conservation/restoration-based economies that work for communities. Financial and technical support for the development of these alternative land uses may need to be integrated with resolution of land claim issues.

Table 4 Level of Dependence of Villages on Use of Forest Reserve

District/Villages	Land in Forest Reserve (Ha)	Total Village Land Area (Ha)	% Village Land in Forest Reserves	% in Forest Reserve if Bonggaya Degazetted	
Telupid					
Kopuron	7.62	541.62	1.41	1.41	
Malapi	14.99	174.99	8.57	8.57	
Liningkung	0	176.00	0	0	
Bakong bakong	0	365.78	0	0	
Tarasak	0	24.00	0	0	
Tongod					
Tampasak	179.08	246.98	72.51	72.51	
Maliau	139.57	842.33	16.57	16.57	
Langkabong	283.67	747.45	37.95	37.95	
Linayukan	352.64	1379.37	25.57	25.57	
Semundoh	0.00	686.72	0.00	0.00	
Beluran					
Rungus Baru	91.00	91.00	100.00	0.00	
Cenderamata	51.00	151.30	33.71	0.00	
Rancangan cocos	88.00	88.00	100.00	0.00	
Malapi	0.00	371.00	0.00	0.00	
Dampiron	138.00	634.17	21.76	21.76	
Kinabatangan					
Sinar Jaya	0.00	526.86	0.00	0.00	
Kasih Sayang	0.00	206.78	0.00	0.00	Dependence
Muhibah	0.00	76.00	0.00	0.00	0-12.4%
Sangau	0.00	143.00	0.00	0.00	12.5-24.9%
Balat	0.00	6.00	0.00	0.00	25-49.9%
Grand Total:	1,345.56	7,479.33	17.99	14.92	50% Plus

Sources: FLAP/CSPO Field surveys and cadastral maps, analysis of satellite imagery

Native Customary Rights

Rooted in the “Native Rights to Land and Proclamation” of 1889, the Sabah Land Ordinance of 1930 defines Native Customary Rights (NCR) in Section 15 (see Appendix F) in ways still highly applicable to Sabah’s smallholder oil palm landscapes today. Under section 66 of the Sabah Land Ordinance (1930), NCR confers upon the landholder a permanent, heritable and transferable right of use and occupancy of their land (Human Rights Commission of

Malaysia, 2013). For those wishing formal documents of title affirming their NCR, the Sabah Land Ordinance prescribes an inquiry process which involves on the ground verification. Therefore, the Land Application process is not the only option for smallholders to secure individual ownership over ancestral or native customary land. However, and for a variety of reasons related to how the government has administered the country and the collateral requirements of financial institutions, Sabah's Indigenous communities have generally been encouraged to pursue Land Applications (which applies to State Land, and so in effect means Indigenous People's first forfeiting their rights to the state) rather than use their foundational NCR (Appendix G).

The FLAP process recognizes that each oil palm smallholder, or village land claimant community, will choose how they wish to apply for and hold land rights. However, the team also notes that when presented with fuller information about NCR versus LA options many Indigenous communities will see the virtues of NCR. The FLAP Team also believes that the Jurisdictional Certification Steering Committee (JCSC) and State Government agencies will also see that initiating an NCR process may be a powerful way of resolving many stalled Land Application processes and resolving intractable disputes where the State is having difficulty deciding between different articulate claimants but an NCR process would make clear who the original rights holders are. On the other hand we recognize that MPOB does not recognize NCR, and that formal title is also sought as collateral for private loan finance.

One complicating issue with NCR is the definition of "Native". Most but not all oil palm smallholders in TTBK are of Indigenous descent. Many are of Indigenous descent but are not in the areas they occupied prior to the colonial period, having either moved across state/national borders or within Sabah, due to past or present government policies and programs, as well as under their own initiative. Some such communities have now obtained "Native" status through negotiation with the powers that be, while others have not, and some occupy lands still claimed by earlier peoples. In other cases migrant Indigenous communities have gone through customary rituals with former territory holders which grant them land rights under "adat", whether or not the State has yet acknowledged them as Indigenous. The FLAP Team do not believe there is one single answer to these questions (the context and details vary and matter), but advocate that full consultation be done in each case and following the spirit of the original 1930 Land Ordinance which was to set limits on how the State could take over land from native peoples in Borneo for private and public development purposes.

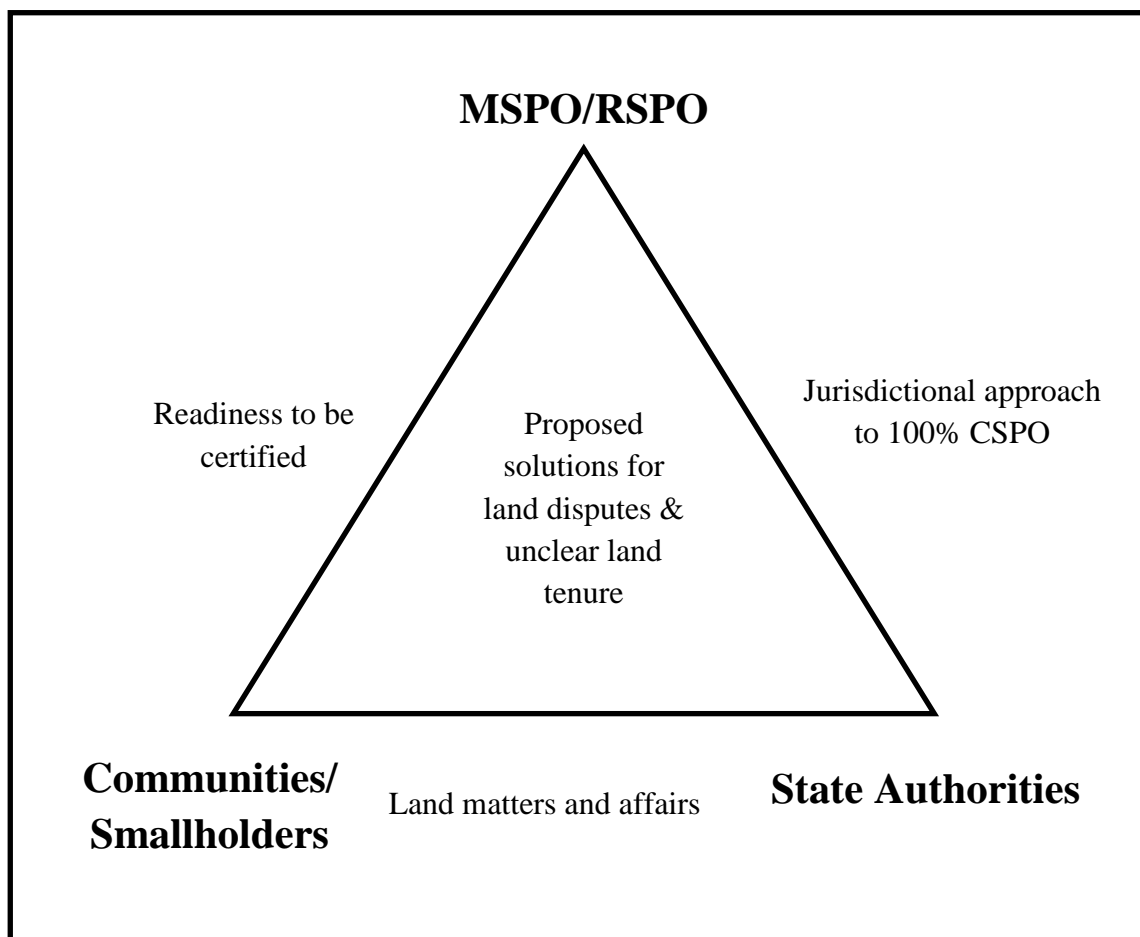
The FLAP Team therefore proposes that smallholder communities with oil palm land tenure issues explore a range of options, including NCR (where relevant) within a framework encouraged by the JCSC. Ultimately each land claimant decides on what basis they wish to pursue and hold their land rights.

2.0 Facilitated Land Application Process (FLAP)

2.1 Conceptual Understanding of How FLAP Works

FLAP's objective is to facilitate the resolution of issues related to land disputes and unclear land tenure faced by oil palm smallholders in Sabah. This step is crucial for the state to achieve 100% certified sustainable palm oil through Jurisdictional Approaches. FLAP works within the reach of three domains of entities: the state authorities, MSPO/RSPO and communities or smallholders with land disputes and unclear land tenure. The relationship between these three entities and FLAP process is illustrated in Figure 2.

Figure 4: How FLAP Assists Sabah to Resolve Smallholder Land Issues



FLAP does not function as an assessment tools for smallholders to determine the legitimacy of their claims. It rather functions as a proper guide and support process agreed with the state authorities for the smallholders to produce documents that accumulate relevant evidence of their customary land tenure and user rights. These documents will then to be used as a basis for them to clarify their claims over the land to facilitate adjudication by Lands and Surveys Department (LSD) and other relevant agencies based upon the provisions provided in Sabah

Land Ordinance (1930). These documents can also be presented to any other person or institution with whom the smallholder may have a dispute in order to ascertain the precise nature of their land and user rights so that a solution can be negotiated with other land claimants (and their evidence of rights).

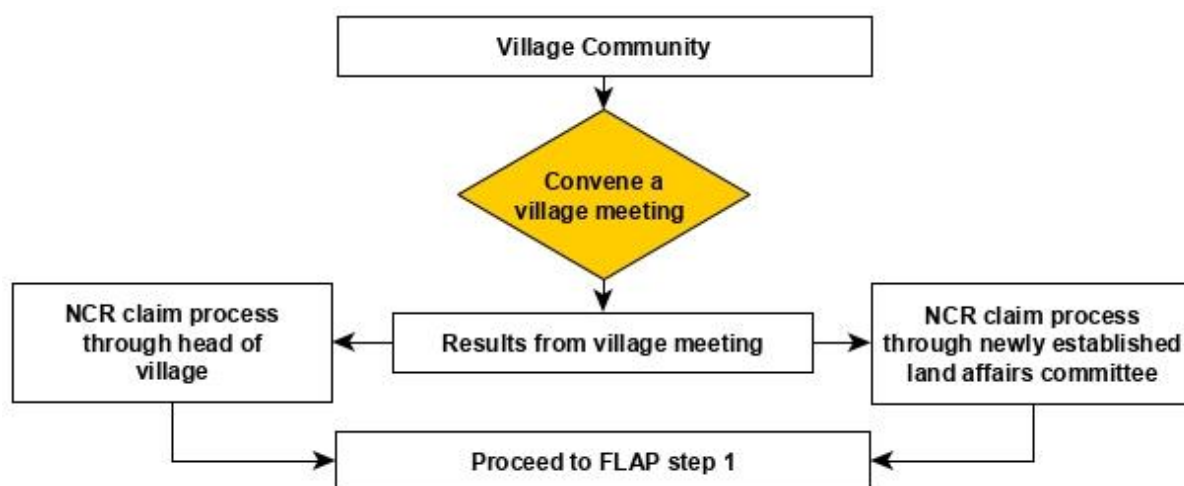
This guide will only be effective for smallholders who have existing legal, customary or user rights over the land and is not intended to establish rights. To determine smallholders' customary and user rights, please refer to Appendix F that describes the definitions of NCR in sections 15 and 66 of Sabah Land Ordinance (1930).

FLAP can work in a variety of ways depending upon how different government agencies and the smallholders wish to address the issues. A given government department, such as the Sabah Forestry Department, might wish to develop a systematic program across all the kampung involved to find appropriate solutions to then be explored on a case-by-case basis. Alternatively, FLAP might work with groups of smallholders/kampung to clarify their claims using NCR (or another legal process according to the smallholders' wishes), and contact the relevant government agencies on a case-by-case basis. In Riparian and Forest Reserves the resolution of certain land issues may be coupled with conversion of land use away from oil palm to other livelihoods with lower environmental footprint and equal or greater economic value. As shown in the CSPO Smallholder Readiness report of May 2018 most communities in TTBK are far too dependent upon oil palm for sustainability and resilience and need to diversify their sources of food and income.

2.2 Local Institutional Framework for NCR Claims

Indigenous peoples are entitled to make their NCR claims to the Assistant Collector of Land Revenue in writing or by filling in the claim form. According to Section 14 of SLO (1930): "Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector". Therefore, indigenous peoples can make NCR claims individually or by group through the village head or *Ketua Kampung* and Assistant Collector of Land Revenue. However, we recommend that this should be done through the Village's Land Affairs committee (of which the headman is a member). The process to set up an institutional framework for NCR claim is illustrated in Figure 4 below. Once the NCR claim has been submitted and then recorded, the Assistant Collector of Land Revenue shall conduct an investigation or land inquiry for the authentication process and validate the claim. The sample of the NCR claim form is attached in Appendix J. This form is to be attached together with NCR documentation in accordance with Case Profiling Guide as shown in Appendix I.

Figure 5: Local Institutional Framework for NCR Claims



2.3 Stages of the Facilitated Land Application Process

Stage One Determine the Land Status and Documentation

Step 1: Determine the land status

- 1.1 Smallholders who have planted oil palm on land with disputes or unclear land tenure shall determine the location and the boundary of their claims. This requires smallholders to determine their land markers and current occupation.
- 1.2 Next, smallholders have to determine the category of land disputes and unclear land tenure that they face.
- 1.3 This is essential to understand the constraints that are halting them from legalizing their oil palm farm. Moreover, this will ensure that the best solution for their problem can be proposed.
- 1.4 Identification of the kind of land disputes and unclear land tenure identified:
 - i. Overlap with forest reserved boundary
 - ii. Overlap with riparian reserve
 - iii. Overlap with titled company's land
 - iv. Overlap with other smallholder's land
 - v. Unprocessed Land Application (LA)
 - vi. Land already measured, title numbers produced but smallholders have not received a land title.
- 1.5 Identify with the claimants the kind of documentation of evidence that will be needed to clarify smallholders' claims to the land
- 1.6 An established local institution that governs land affairs in the village or the head of the village shall administer the documentation process.
- 1.7 At this stage, documentation of vital information shall be held in accordance with the Case Profiling Guide that was provided together with this guide (Refer to Appendix I).

1.8 However, if their land has already measured and documented by the relevant authority body [Refer to unclear land tenure category in 1.4 (vi)] they should focus on follow-up with relevant agencies as frequently as possible.

Step 2: Documentation process

2.1 It is important to conduct a documentation process (see Appendix J) with the villagers' participation; this process advocates the spread of knowledge and awareness with regards to smallholders' land tenure and rights.

2.2 Due to the complexity of the documentation process might be to smallholders, this process shall be assisted by a credible or trained individual or entity.

2.3 Credible or trained individual or entity will serve as a facilitator of FLAP.

2.5 The information required for producing the smallholders' case profile can be shared with other villagers and communally used for instance, to update the village profile.

Stage 2 Conduct Due Diligence, Authentication and Case Assessment

Step 3: Dissemination and authentication of information

3.1 During the process of documentation, the FLAP Facilitator is required to review and disseminate the information back to the villagers and credible third-party verifiers. Credible third-party verifiers may consist of internal and external stakeholders.

3.2 Credible third-party verifiers shall verify and may provide additional information to the document.

3.3 Authentication and verification process will provide the necessary step to ensure that every stakeholder of FLAP recognizes that information and evidence accumulated in the document are true.

3.4 After all information has been verified as true, the facilitator then proceeds to the next step.

Step 4: Conduct due diligence and document assessment

4.1 After the case profile has been completed, the FLAP facilitator is required to review and conduct due diligence on smallholders' land rights or status.

4.2 Facilitator then determines whether smallholders' claim is legitimate according to relevant land regulating the law. This is to ensure compliance with all national and state laws applicable to Malaysia and also that their case is strong.

4.5 Legitimate claims are determined in accordance with 'Criteria for claims of customary and user rights' (Box 1) and the definitions of NCR in sections 15 and 66 of Sabah Land Ordinance (1930) (refer to Appendix F).

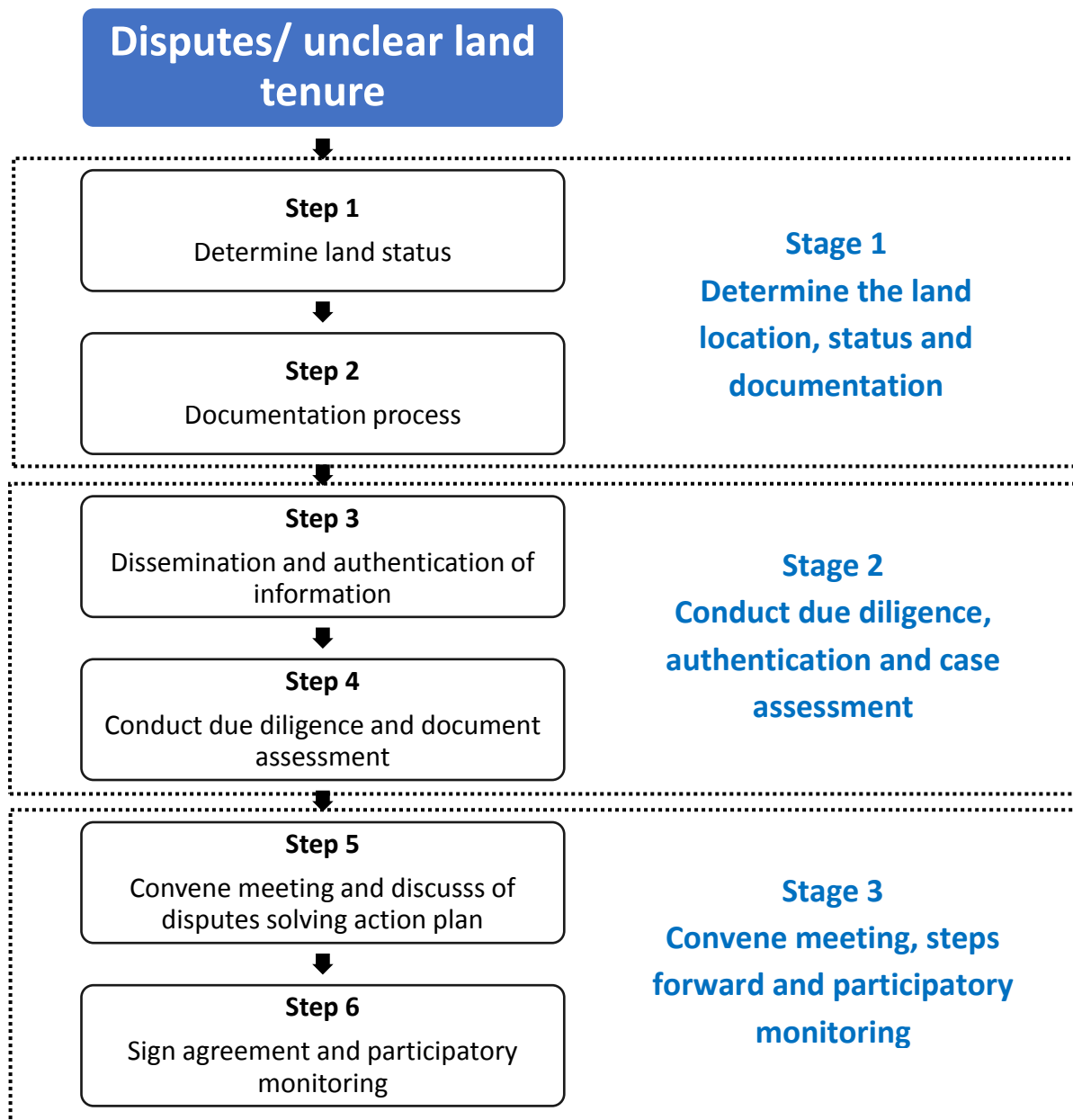
4.6 After that, the facilitator is required to assess whether smallholders have legitimate claims as well as strong case to claim their rights or otherwise.

4.7 If the assessment result shows that smallholders have legitimate claims and strong case, they shall proceed to the next step.

4.8 However, if the facilitator’s assessment result shows that smallholders do not have legitimate claims or a strong case, the facilitator then shall revise their documentation process or FLAP Facilitator shall not proceed to the next stage.

4.9 After legitimate claims have been decided in 4.8 above, smallholders’ land will be known as NCR in the next step of this guidance.

Figure 6: Flowchart Illustrating FLAP Stages



Stage 3 Convene Meeting, Steps Forward and Participatory Monitoring

Step 5: Convene meeting and discuss of dispute solving action plan

5.1 In this stage, the facilitator shall convene a meeting to give recommendations to the smallholders based on land disputes and unclear land tenure identified as the following:

- i. Overlap with forest reserved boundary
- ii. Overlap with riparian reserve
- iii. Overlap with titled land (company)
- iv. Overlap with titled land (individual)
- v. Overlap with other smallholder's land (NCR)
- vi. Unprocessed Land Application (LA)

5.2. Land disputes and unclear land tenure mentioned in 5.1 above are classified into three categories as described as follows:

- a) **Category 1: Native Customary Rights** (Category where smallholder's NCR overlap with other smallholder's NCR land and unprocessed land application).
- b) **Category 2: Forest Reserve & Riparian Reserve** (Category where smallholder's NCR overlap with forest reserve and riparian reserve boundaries).
- c) **Category 3: Titled Land** (Smallholder's NCR overlap with the company's titled concession).

5.3. The rationale for step in 5.2 above is taken to make sure that the most suitable recommendations are used to resolve smallholders' land disputes and unclear land tenure issues.

5.4 **Category 1a:** When smallholders with land claimed under **Native Customary Rights (NCR)** are still under **Land Application (LA)** status, the following steps are recommended to be taken.

- a) FLAP Facilitator shall advise smallholders to request for updates from the authorities frequently regarding the status of smallholders' Land Application (to advance on the LA route).
- b) Other than that, smallholders also can choose to register their Land Application (LA) land as NCR land via written letter or the form (Appendix I).
- c) To advance NCR the documents that have been produced during the earlier stages of FLAP shall be presented to the Assistant Collector of Land Revenue for reference.
- d) The approval of NCR and LA/Land Title will be at the authorities' discretion.

5.5 **Category 1b:** When smallholders have land disputes with another smallholder whose land was claimed under **Native Customary Rights (NCR)**, the following steps are recommended to be taken.

- a) FLAP Facilitator shall initiate to convene a meeting both conflicting parties.
- b) During this meeting, the village headman shall be presented to judge the case based on *adat*.
- c) During this meeting, if necessary with the help of the FLAP facilitator, all conflicting parties shall present their substantial evidence with regards to their claims.

- d) The village headman shall make a decision based on the information presented.
- e) If either one or both parties refused to follow the decision given by the headman, the FLAP facilitator shall advise settling in native court.
- f) If disputes have been resolved, both parties shall either proceed to submit their written NCR registration (via written letter or form) and land application.
- g) The documents that have been produced during the earlier stages of FLAP shall be presented to the Assistant Collector of Land Revenue for reference.
- h) The approval of NCR and Land title will be at the authorities' discretion.
- i) However, the smallholder shall frequently request updates regarding their registration and application.

5.6. **For Category 2: Forest Reserve & Riparian Reserve** in Sabah are usually governed by a particular governmental body that was given a mandate by the state government and has its own laws and regulations. When smallholder's land claimed under NCR has to dispute with a **Forest Reserve** or a **Riparian Reserve**, the following steps are recommended to be taken:

- a) FLAP Facilitator shall initiate to convene a meeting with related government agencies.
- b) When the related government agencies agree to meet, the facilitator shall inform the community regarding the time and location of the meeting.
- c) During the meeting, the facilitator shall present the location of the land and how the land is under smallholder's legitimate rights (NCR).
- d) The facilitator also has to highlight that the need to resolve land disputes and unclear land tenure is based on the requirement for the state to be 100% RSPO Certified Sustainable Palm Oil through Jurisdictional process.
- e) Information presented during this meeting shall be based on documentation that has been produced in earlier stages of FLAP.
- f) Since this process will be done in a group, smallholders shall be represented by community self-chosen representative(s).
- g) The facilitator and community representative shall discuss with the government agencies on the conditions that would solve disputes that they are facing.
- h) Land dispute solving mechanism shall be thoroughly discussed while possible alternatives shall be explored. For example, the community shall request for certain areas in the forest reserve and riparian reserve in which the communities have Native Customary rights and user rights to become 'community use zone (CUZ)' or request for de-gazettement of the area. (But note that under RSPO oil palm cannot be certified in de-gazetted forest.)
- i) The community's own chosen representative may also request for a land inquiry or investigation for the relevant authority to verify and validate the legitimate rights from the community's claims.
- j) If there is no final decision made during the meeting, the smallholder shall proceed to claim their land through the civil court based on recommendations from the facilitator.

- k) If a governmental agency offers or agrees a land dispute and unclear land tenure solving action plan, the facilitator and community's own chosen representative shall discuss the specific terms and conditions.
- l) The specific terms and conditions discussed shall be formalized in a written drafted agreement.
- m) After a drafted agreement has been produced, the facilitator shall proceed to step 6.

5.7 For Category 3: Titled Land, in some cases, smallholder's NCR is found to overlap with alienated land owned by a company or other titled landowner. The recommended steps to be taken are described as follows:

- a) FLAP Facilitator shall initiate to convene a meeting together with the titled landowner.
- b) When the conflicting party (The Company) agrees to meet, the facilitator shall inform the community regarding the time and location of the meeting.
- c) During the meeting, the facilitator shall present the location of the land and the documentation of how the land is under smallholder's legitimate rights (NCR).
- d) The facilitator also has to highlight that the need to resolve land disputes and unclear land tenure is based on the requirement for the state to be 100% RSPO Certified Sustainable Palm Oil through the Jurisdictional process.
- e) Information presented during this meeting shall be based on documentation that has been produced in earlier stages of FLAP.
- f) Since this process will be done in a group, smallholders shall be represented by the community's own chosen representative(s).
- g) The facilitator with conflicting parties shall discuss the conditions that would solve disputes that they are facing.
- h) Land dispute solving mechanism shall be thoroughly discussed while possible alternatives shall be explored.
- i) If there is no final decision made during the meeting, the smallholder shall proceed to claim their land through the civil court based on recommendations from the facilitator.
- j) If the titled landowner offers a land dispute action plan, the facilitator and community's own chosen representative shall discuss the specific terms and conditions.
- k) The specific terms and conditions discussed shall be formalized in a written drafted agreement.
- l) After a drafted agreement has been produced, the facilitator shall proceed to step 6.

Step 6: Agreement Signing and Participatory Monitoring

6.1 FLAP process shall proceed to step 6 if there are any specific terms and conditions agreed and discussed to solve land disputes and unclear land tenure issues.

6.2 After the agreement has been drafted, all sides with land disputes shall have full disclosure on the final version of terms and conditions before it can be signed and notarized.

- 6.2 All conflicting parties shall sign the agreement and each party shall keep one original copy each.
- 6.4 All terms and conditions discussed shall be implemented and monitored in participatory ways.
- 6.4 There are no standard terms and conditions proposed in this guide as the specifics of disputes vary from one another.

Appendixes

Appendix A: List of Acronyms and Abbreviations

CUZ	Community Use Zone
CL	Country Lease
CSPO	Certified Sustainable Palm Oil
FFB	Fresh Fruit Bunches
FLAP	Facilitated Land Application Process
FR	Field Register
JC	Jurisdictional Certification
JCSC	Jurisdictional Certification Steering Committee
Kg	<i>Kampung</i> [Village]
LA	Land Application
LSD	Lands and Surveys Department
LUC	Land Utilisation Committee
MYNI	Malaysia National Interpretation
MPOB	Malaysian Palm Oil Board
MSPO	Malaysia Sustainable Palm Oil
NCR	Native Customary Rights
NT	Native Title
PL	Provisional Lease
PC&I	RSPO Certification Principles, Criteria and Indicators
RSP	Registered Survey Paper
RSPO	Roundtable on Sustainable Palm Oil
SFD	Sabah Forestry Department
SLO	Sabah Land Ordinance
TL	Town Lease
TTBK	Tongod, Telupid, Beluran and Kinabatangan Districts Pilot Area

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Appendix E: Oil Palm Smallholders in Sabah

Besides palm oil companies, smallholders also play an important role in supplying palm oil to the global market. The general definition of smallholders according to the government of Malaysia is growers with less than 40.46 ha oil palm farms (NEPCon, November 2017). On the other hand, the Roundtable on Sustainable Palm Oil (RSPO) suggests a different version of the definition. They were defined as farmers who grow oil palm less than 50 ha. In addition to that, smallholders are also referred to as farmers who grow subsistence crops alongside their oil palm using primarily household labour whereas their main source of income was generated from the farm (RSPO, 2009).

Most smallholders in Sabah are indigenous peoples. They grow oil palm on untitled land or native customary land rights (NCR) and lands that they are entitled to under Native Title of 15 acres or less, allocated to them under the Sabah Land Ordinance 1930. Nevertheless, titled or not, indigenous groups consider such lands as ancestral to which they have rights of access. To them, untitled land means insecurity of tenure, since under the Torrens system, land use on untitled lands can be changed at the discretion of the State (Cooke, 2013).

While, there are schemes or government assisted smallholders in Sabah whose efforts are managed by government or government-linked development agencies, most smallholders in Sabah are independent growers. These independent smallholders grow oil palm on small plots, often on land less than 15 acres, using largely household labour and receive limited or no subsidy from the government. On the other hand, they are free to sell their fresh fruit bunches (FFB) to any particular individual or company. Producers who are part of schemes or otherwise government assisted are bound to sell their FFB to a particular company or mill. This type of smallholder usually exists when their oil palm planted under a joint venture scheme or program.

In 2009, the Agropolitan programme was launched during the period of the Ninth Malaysia Plan (2006-2010). The programme was aimed at eradicating the prevailing rural poverty in Sabah (SLDB: Corporate News, 2014). From this project, smallholders contributed their Native Title or Communal Title land while SLDB acted as a developer. The oil palm plantations developed or established would eventually be managed by the smallholders while sharing 60-70% of the profit, after completion of a 25-year agreement period during which time SLDB would be the manager. Upon completion of the agreement, smallholders have been promised that they will be awarded titles for their land (NEPCon, August 2017), but whether this promise will be fulfilled remains to be seen.

Box 2: Expansion of Smallholder Oil Palm in Malaysia

Independent smallholders are able to balance their production and enjoy production returns more fully than those assisted smallholders (Cooke et al. 2017). Data obtained shows that there are significant increases in total area planted oil palm in the 5 year period between 2012 and 2016 across every state in Malaysia. In 2012 independent smallholder planted area amounted to 691,688 ha or 13.6% of the total planted area (MPOB, 2012). In 2016, these smallholders planted 933,948 ha or 16.3% of the total planted area (MPOB, 2016).

Appendix F: Smallholders' Customary Land Tenure and Living Conditions

The Indigenous People who live in the interior region of Sabah today are not solely dependent on forests and rivers for livelihood. Instead, mostly they are practicing a dual economy system that was driven by several factors and situations that they face. As a case in point, decreasing of non-timber forest products and marine resources as sources of subsistence has occurred alongside increasing reliance on cash from employment and estate crops. These circumstances are making them more dependent on market-oriented livelihood when subsistence-oriented livelihood provision is scarce. Cash crops have become a popular market-oriented livelihood for indigenous communities residing in rural areas of Sabah. One of the most common types of cash crops that can be found planted is oil palm. Its popularity among the indigenous people generally portrayed through the expansion of the oil palm frontier in the state and the massive conversion of old land use into oil palm over the past decades.

Customary law has an immense influence on the indigenous peoples in Sabah which essentially guides their daily lives including on matters that are related to land (Wong-Adamal, 1998). In local dialect, customary law is also known as '*adat*' and its existence can be traced since immemorial times. *Adat* plays an important role in guiding the indigenous communities with regards to land affairs within the *kampung* territorial domain, including land acquisition, land collective ownership and communal use. A *kampung* territorial domain is referring to a certain area that with a defined boundary where indigenous community maintained or governed through *adat*. The land ownership within the '*Kampung*' territorial domain can be either or both individual and collective ownership or communally used (Chaffey and Chan, 2018). According to the Human Rights Commission of Malaysia (2013), a *kampung* territorial domain may consist of the community's settlement area, backyard gardens, farms, old farms/village sites, cemetery, grazing area, ceremonial spots and forest within defined *kampung*'s boundary.

Generally, the indigenous communities well understood that rights over a certain piece of land are conferred to the individual or household who first cleared the land. They will then

define the boundary of their land using available natural features such as streams, watersheds or ridges and with markers that were planted or erected (Human Rights Commission of Malaysia, 2013). Based on this practice, their forefathers' generation has secured their rights by establishing settlement areas, agriculture plots and even foraging grounds on certain pieces of land that used to be forested. Since customary law perceived such rights as permanent and inheritable by younger generations, some indigenous communities from distinguished villages in Sabah today still can be found settling and pursuing their livelihood on the land that they have inherited.

Indigenous Peoples' customary rights to ancestral land have been embodied in the Sabah Land Ordinance (1930) and were derived based on customary law practices since immemorial times. This legislation uses the terms 'native' when referring to the Indigenous Peoples as well as the terms native customary rights (NCR) when referring to Indigenous Peoples' customary rights. Sabah Land Ordinance serves as a primary legislative instrument on land tenure for the Sabah state. The provisions under this set of law enable the state to governs lands including protecting NCR that are specially allocated for the indigenous people of Sabah. Apart from NCR, this set of laws also governs other types of land in the state as described in Box 2 below.

Box 3: Categories of Sabah Land Tenure according to Sabah Land Ordinance (1930)

There are two broad categories of land tenure in Sabah; State Land (Section 12) and Native Customary Land or Tanah Adat Anak Negeri (Sections 14, 15, 65 and 66). Under State Land, there are five types of land titles, namely: Town Lease (TL), Country Lease (CL), Provisional Lease (PL), Native Title (NT), Field Register (FR). Meanwhile, NCR land can be either "Communal" or "Individual" and are secured by various specific evidences of historic and customary use (such as fruit trees or burial grounds).

The first three types, TL, CL and PL are open to all citizens and non-citizens of Malaysia whereas the latter three categories, NT, FR and NCR are specifically meant to sustain the rights of the indigenous peoples of Sabah; the Land Ordinance originally conceiving that only State lands free of proven NCR claims are eligible for lease either in the country or in towns under the other types of title.

[Source: Extracted from Wilson et al., (2018), page 63]

The definition of Native Customary Rights (NCR) as used by the Lands and Surveys Department of Sabah, who govern land affairs in the state, can be found in Section 15 of SLO (1930). Under section 15, NCR was prescribed to ascertain the following:

- (a) land possessed by customary tenure;
- (b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
- (c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;

- (d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth
- (e) land that has been cultivated or built on within three years;
- (f) burial grounds or shrines;
- (g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

(Source: Extracted from Sabah Land Ordinance, 1930).

The definition of 'customary tenure' mentioned in Section 15 (a) above can also be found in section 66. The section prescribes that 'customary tenure' refers to lawful possession of land by natives obtained through continuous occupation or cultivation for three or more consecutive years (Sabah Land Ordinance, 1930). Section 14 of SLO (1930), prescribes that NCR land is registrable through a written application to the Assistant Collector of Land Revenue. NCR can be claimed on the basis of establishing on of the criteria above (Wong-Adamal, 1998).

Appendix G: The Insecurity of Customary Land Tenure

In Sabah, the attempt to incorporate customary law into law that dealt with land matters and affairs was first done by North Borneo Chartered Company that was established in North Borneo since the year 1881 (Wilson et al., 2018). Before the year of its establishment, this company already acquired various territories from the beginning of the year 1880 until 1881 from the Sultan of Sulu. These territories were situated in North Borneo which now comprises the present state of Sabah. After the company's establishment, their officials were charged to respect native customary rights and customs and consequently, the company passed a written law entitled "Native Rights to Land and Proclamation "1889)" with a preamble 'for protection of native rights to land'. This law is believed to be the first written law that specifically incorporated and enshrined customary law to protect indigenous p'oples' rights to land in Sabah (Wong-Adamal, 1998).

Although the law passed at that time provides protective provisions towards the Indigenous P'oples' rights to land, there is contrary truth about it according to a report published by Human Rights Commission of Malaysia (2013). The report discussed how the legal pluralism system imposed by the North Borneo Chartered Company has narrowed the interpretation of natives' customary land tenure. The company instituted legal pluralism in which native customary law, as well as legal western concepts, incorporated into a set of laws that dealt with land matters and affairs (Human Rights Commission of Malaysia, 2013). Whilst it seems to be promising in ensuring protection over native rights, some customary law was seen as obstructive with regards to expand the company's businesses. By instituting legal pluralism systems, the company has replaced some customary laws that hampered their

businesses with legal western concepts while some others were supported and have been enshrined or embodied (Human Rights Commission of Malaysia, 2013).

There have been several versions of NCR definition adopted in the history of Sabah's law before the SLO was enacted in 1930. As a case in point, native rights in the "Native Rights to Land and Proclamation" (1889) were described as:

- a) land under cultivation or containing houses together with a Reserve of adjoining or neighbouring land;
- b) land planted with at least twenty fruit trees to each acre;
- c) isolated fruit trees;
- d) grazing land that the owner agreed to keep stocked;
- e) wet and dry paddy cultivated within three years;
- f) burial grounds; and
- g) usual right of way.

[Source: Extracted from Human Rights Commission of Malaysia (2013), page 44]

There have been several proclamations and amendments passed or enacted after the "Native Rights to Land and Proclamation" (1889) above. For comparison, native customary rights to land definition in between SLO (1930) and Native Rights to Land and Proclamation (1889) have slight differences although most elements were retained.

As reported by the Human Rights Commission of Malaysia (2013), the current version of NCR definition according to SLO (1930) does not reflect the actual indigenous peoples' practice on customary land tenure today. The practice of the 'fallow period' in the traditional cultivation system was not recognised as part of customary land tenure by the Government. As a case in point, the fallow period for hill rice cultivation is between three to ten years. During the fallow period, there will be no occupation and cultivation made by the indigenous peoples resulting in the land to be considered by the Government as 'abandoned' that could allow the Government to resume in possession over the land. In this case, natives can avoid this situation if they remain in occupation and continue cultivating the land. This portrayed how lack of recognition on certain practices of customary land tenure and historical factors have caused land tenure insecurity for the native of Sabah although the incorporation of customary law into the land ordinance should have the ability to protect the natives' rights.

Although NCR land was recognized in the SLO, the native people of Sabah today have mostly gone for applying individual title or alienated land by the state called Native Title (NT). If a piece of land remains either unregistered as NCR or unoccupied, they are officially categorized as 'state land' by the land administrator of Sabah unless it has been proven as NCR (Majid Cooke and Mei, 2012). According to the Human Rights Commission of Malaysia, (2013) there are two main reasons for this to happen. First, there has been a consistent promotion over the years by Sabah Lands and Surveys and Department for individuals to apply for individual land titles, second, individual land titles are more likely to

be accepted as collateral by financial institutions. In spite of this, smallholders had difficulties in getting their land titled. In some cases, smallholders have applied land titles many years ago but their land titles are still yet issued. The reasons behind this are not only administrative but also because of the presence of business and corporate economic activities on land which individuals or a village are claiming as their NCR [Human Rights Commission of Malaysia (2013) and Chaffey and Chan, (2018)].

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Appendix I

Case Profiling Guide

INSTRUCTIONS:

*Not all information requested in every section has to be completed. The need to provide information or documents varies from case to case.

No	CHECKLIST	
Section A: Personal information		
A1	Name	<input type="checkbox"/>
A2	Identification Card Number	<input type="checkbox"/>
A3	Age	<input type="checkbox"/>
A4	Personal background	<input type="checkbox"/>
Section B: The history of village establishment		
B1	Describe how the kampung got its name.	<input type="checkbox"/>
B2	Chronology of land occupation/ The history of kampung settlement	<input type="checkbox"/>
B3	The highest number of villagers' generations in the kampung.	<input type="checkbox"/>
B4	List of village chief appointment letters (Village headman/ JKKK – From the beginning until the present.	<input type="checkbox"/>
Section C: Description of Land location		
C1	Total kampung area.	<input type="checkbox"/>
C2	Total area of disputed/ claimed land	<input type="checkbox"/>
Section D: Village map		
D1	Map showing the whole kampung area.	<input type="checkbox"/>
D2	Map showing land under dispute.	<input type="checkbox"/>
D3	Map/ sketch showing the housing area.	<input type="checkbox"/>
D4	Map showing titled land.	<input type="checkbox"/>
D5	Map showing proof/ evidence (community map).	<input type="checkbox"/>
Section E: Village's demography information		
E1	Number of houses in the kampung.	<input type="checkbox"/>
E2	List & number of families in the kampung.	<input type="checkbox"/>
E3	Total number of villagers.	<input type="checkbox"/>
E4	Villagers' religions.	<input type="checkbox"/>
Section F: Documents on disputed land		
F1	Land Application (LA).	<input type="checkbox"/>

Source: Adapted from *Panduan Penvediaan Profail Kes* PACOS Trust.

F2	S.P / R.S.P letter.	<input type="checkbox"/>
F3	Notice: Section 13 of Sabah Land Ordinance: Enquiry as to native rights (If any).	<input type="checkbox"/>
F4	Letters sent by government agency (If any).	<input type="checkbox"/>
F5	Letters sent to government agency (If any).	<input type="checkbox"/>
F6	Letters of objections (If any).	<input type="checkbox"/>
Section G: Opposition's testimony		
G1	Land Application (LA).	<input type="checkbox"/>
G2	Photocopy of land title.	<input type="checkbox"/>
G3	Map showing the location of the titled land.	<input type="checkbox"/>
G4	Opposition's testimony (company/ individual).	<input type="checkbox"/>
Section H: Documents on land claim		
H1	Police report on NCR land intrusion.	<input type="checkbox"/>
H2	Objection/ appeal letter.	<input type="checkbox"/>
H3	Picture indicates proof / evidence (e.g.: houses/ fruit trees/ cemetery etc.).	<input type="checkbox"/>
H4	Letters of support/ authentication from high rank leader/ officer (Political party, District officer, member of parliament or state assemblyman).	<input type="checkbox"/>
Section I: Testimony of families who participate in the land claiming process		
I1	Number of families who participate in the land claiming process.	<input type="checkbox"/>
I2	Number of families who intruded on the land.	<input type="checkbox"/>
I3	Number of families who are affected by the land intrusion but have not yet decided to participate in the claiming process.	<input type="checkbox"/>
Section J: General information		
J1	List of villagers involved in claiming the land.	<input type="checkbox"/>
J2	Information on land administration (Parliament, state assembly, district, sub-district).	<input type="checkbox"/>

Source: Adapted from *Panduan Penvediaan Profail Kes PACOS Trust*.

Appendix J

**Form for Claiming Native
Customary Land Rights
(NCR) of Beluran's Lands
and Surveys Department**

SABAH, MALAYSIA
DI PEJABAT PENOLONG PEMUNGUT HASIL TANAH
BELURAN

(Seksyen 14 Ordinan Tanah Sabah)

BORANG TUNTUTAN HAK TANAH MENGIKUT ADAT ANAK NEGERI SABAH
(Dilengkapkan oleh Penuntut)

1.0 Butir-butir penuntut:

- 1.1 Nama Penuh:
- 1.2 No. kad pengenalan:
- 1.3 Tarikh Lahir:
- 1.4 Tempat Lahir:
- 1.5 Umur:
- 1.6 Alamat Tempat Tinggal:
- 1.7 Alamat perhubungan:
- 1.8 Nombor telefon:
- 1.9 Suku kaum:
- 1.10 Nama Kawasan yang dituntut:

2.0 Butir-butir Tanaman:

Bil.	Nama Tanaman	Bilangan	Unit	Umur

3.0 Butir-butir bangunan/struktur:

Bil.	Kegunaan bangunan/ struktur	Bilangan	Struktur Binaan	Tahun didirikan

4.0 Butir-butir ternakan:

Bil.	Jenis Ternakan	Bilangan Ternakan	Tempoh menternak
1			
2			

5.0 Butir-butir Perkuburan:

Bil	Nama Simati	Tarikh dikebumikan	Tahun	Agama simati (jika diketahui)

6.0 Lain-lain keterangan:

Saya mengaku bahawa keterangan mengenai butir-butir diri dan tuntutan saya di atas adalah benar.

Tandatangan:

Nama/IC:

Tarikh:

**NOTA: jika ruangan tidak mencukupi sila sertakan lampiran*