

Tenure and Investment: Maritime Southeast Asia

Disputes with local peoples over land and resource rights create operational and reputational risks for companies and investors through delays, rising costs, and curtailed access to finance and markets. This paper looks closely at recent disputes in Maritime Southeast Asia (Indonesia, Malaysia, and the Philippines) and investigates their impact on investment in land-based assets. The purpose of the analysis is to provide a clearer picture of tenure disputes in the sub-region to help companies, investors, governments, and CSOs avoid and resolve them.

It compares these recent cases to historical and global trends to provide a current and representative picture of tenure risk in the sub-region. Our investigation then focuses on three cases studies from the Indonesian palm oil sector which can help companies and investors understand how and why disputes can have such varied, and in some cases severe impacts on their operations and reputations.

Our investigation suggests there are some improvements in the governance of land tenure in Maritime Southeast Asia, such as the entitlement process underway in Indonesia. Some companies are also doing more to recognize tenure rights and engage with the interests of local peoples. However, this progress is highly uneven and lacks the rigor of regulatory improvement. Companies and investors can manage the risks posed by this operating and regulatory environment by treating local peoples as the primary counterparty in any land-based investment.

1. Overview

Maritime Southeast Asia¹ has been at the center of global debates over the social, economic, and environmental impact of insecure land tenure rights.² The purpose of this analysis is to provide a clearer picture of tenure disputes in the sub-region with a view to helping companies, investors, governments, and CSOs avoid and resolve them.

This paper is divided into three main parts. First, we look at macro-level trends across the sub-region. The topline results of this analysis are provided directly below and are detailed at greater length in the [companion report](#) for this paper.

The macro-level perspective is complemented by an in-depth examination of three cases from the Indonesian palm oil sector. Palm oil accounts for more social conflict and financial risk than any other commodity, and plays a singular role in the economy and tenure governance of the sub-region (although its contribution to overall GDP remains small³). This analysis provides insights into the financial and reputational impacts that tenure disputes can have, highlighting which mistakes could have been avoided through due diligence and local engagement.

The last section of this report gives recommendations for key stakeholders in Maritime Southeast Asia. In brief, companies and investors can help close the governance gap at the project-level caused by weak and poorly enforced regulation. In particular, they can improve local engagement and land entitlement processes (through community mapping, for example), while providing access to independent and rapid dispute resolution mechanisms.

Private sector actors must recognize that the quality of tenure governance is highly inconsistent at the sub-national level. Officials can be unreliable, frequently providing misinformation or mishandling local relationships (partly reflecting the high prevalence of public officials having a stake in private sector deals). The only way to manage this risk is to work with local peoples and, where appropriate, their CSO representatives, as a legitimate counterparty in land deals.

Methodology overview

This paper is based on analysis of 21 recent cases of tenure dispute in Maritime Southeast Asia. We examined six disputes from agriculture, six from mining, six from forestry, and three from energy. We focused on disputes that were less than 10 years old, or which had reignited recently,

¹ In this paper, Maritime Southeast Asia is composed of Indonesia, Malaysia, and the Philippines. Brunei has no recorded incidents of tenure disputes and we did not include Papua New Guinea or other island states often considered to be part of Oceania.

² See for example Forest Peoples Programme, 2013, “Conflict or Consent,” <http://www.forestpeoples.org/sites/fpp/files/publication/2013/11/conflict-or-consentenglishlowres.pdf>; see also Greenpeace, “Cutting Deforestation Out of the Palm Oil Supply Chain – Company Scorecard,” <http://www.greenpeace.org.uk/sites/files/gpuk/palm-oil-scorecard-FINAL.pdf>.

³ See Matthias Rhein, 2015, “Industrial Palm Oil development: Liberia’s Path to Sustained Economic Development and Shared Prosperity? Lessons from the East,” http://rightsandresources.org/wp-content/uploads/RRIRReport_Liberia_web2.pdf.

to gain the most representative picture of tenure risk in Southeast Asia today. The cases in this paper date from 2001; of the cases that began more than ten years ago, all but one remain unresolved, with significant events in the dispute occurring in recent years.

These were compared with 30 recent and equivalent cases from Continental Southeast Asia as well as a global set of 237 global cases (excluding Southeast Asia and cases older than 2001) from the IAN Database. The IAN data set was compiled by TMP Systems to inform the development of risk assessment and due diligence tools for tenure risk. It contains data on tenure conflicts from Africa, Asia, and Latin America, and represents a robust and comprehensive body of quantitative evidence on tenure disputes.

The process for identifying and analyzing the new cases and the IAN cases was the same, involving desk-based research to identify a long list of cases, which were then checked to ensure there is enough reliable underlying information to allow for comparison. Further information on the methodology used in this paper can be found in Appendix I.⁴

This paper has also benefitted from interviews with leading experts (see Appendix II). This has helped us to understand sub-regional trends and to look in-depth at three cases from the palm oil sector in Indonesia. These disputes evolved very differently, and this paper considers the factors that determined these different pathways. Details on the selection of these cases is provided in Section 3.

2. Macro-level Trends

This section looks at the most notable features of tenure dispute in Maritime Southeast Asia. It examines the most common causes of tenure disputes as well as the typical impacts for project backers. This is followed by a series of national profiles that pick out the key issues in tenure governance. Top-line findings are provided in brief below:

- 81% of the projects suffered financially significant impacts as a result of the dispute, the highest rate found anywhere in the world. This does not account for considerable reputational damage in many cases.
- Just 14% of the cases in Maritime Southeast Asia have been resolved, compared to a global average of around a third. Around three quarters have been running for over 5 years (the data

⁴ We emphasize that while the cases were identified in order to provide representative coverage, the number of cases overall is still small, and the sample is likely to be affected by issues of reporting. Breakdowns of trends among the cases in this document should be considered as indicative and heuristic, rather than as statistically robust statements of fact covering tenure-related conflict in the sub-region.

do not support a reliable global average for conflict length), which shows how hard it can be to find resolutions to land tenure disputes once they begin.

- Displacement was the most common driver of dispute, featuring as the primary issue in 48% of cases. Environmental damage was also a common problem, accounting for 29% of cases.
- 76% of disputes started before operations began, underlining the importance of early stage diligence and risk assessment.
- 52% of cases involved violence and around a fifth involved fatalities, underlining the threats that these disputes can pose to employees, affected communities, and CSO workers.

Drivers of dispute

Displacement of local peoples was a significant driver of dispute across the three key countries, featuring as a primary driver in a third of cases from the Philippines, half of Malaysian cases, and three quarters of Indonesian cases. Environmental damage played a more significant role in the Philippines (50%) than in the other countries examined. This finding probably reflects the prevalence of mining projects in that country—this sector is often associated with environmental problems such as the contamination of water resources, which tend to elicit strong local opposition.

Conflict outcomes

In terms of conflict outcomes, the high frequency with which aggrieved parties filed lawsuits or official complaints is a noteworthy finding (84% compared to 60% in the Continental sub-region). However, here again we see some variation across countries. Suits are especially common in the Philippines, where 92% of cases we looked at involved a lawsuit or complaint.

Despite this high rate of legal action, we also see a marked aversion to using judicial mechanisms in countries like Indonesia because they are often seen as ineffective or biased. Our discussions with local experts suggest that local peoples must often be persuaded to avail themselves of legal tools and see them as a last resort. As a result, legal tools are not always used in the earliest stages of project development, when they can be most powerful. These problems with local perceptions of the legal system underline the value of external formal complaint processes, such as that of the Roundtable on Sustainable Palm Oil (RSPO), which featured in all our palm oil cases. It likely also helps explain the elevated levels of violence (52% of cases) that we see across the sub-region.

Disputes by sector and country

All of the mining cases we examined were in the Philippines (six cases). Agriculture and forestry are common to all of our countries: in agriculture, Malaysia and the Philippines supply one case each, with the rest from Indonesia (four); in forestry, the majority come from Malaysia (four) with one each from the Philippines and Indonesia. The energy cases are all from the hydropower industry in Malaysia (one) and the Philippines (two).

National Profiles

Looking at each country in turn, we can see considerable differences in national economies as well as in tenure governance.

Malaysia

The Malaysian economy is relatively developed, with GDP per capita of US\$9,768 in 2016, with A3 and A- sovereign debt ratings from Moody's and Fitch rating agencies, respectively.⁵ However, the instability of the Ringgit in 2016 followed by a government crackdown on currency speculators in 2017 has deterred foreign investment.⁶ Foreign Direct Investment remains below the levels seen in 2010/11, as shown in the figure below.

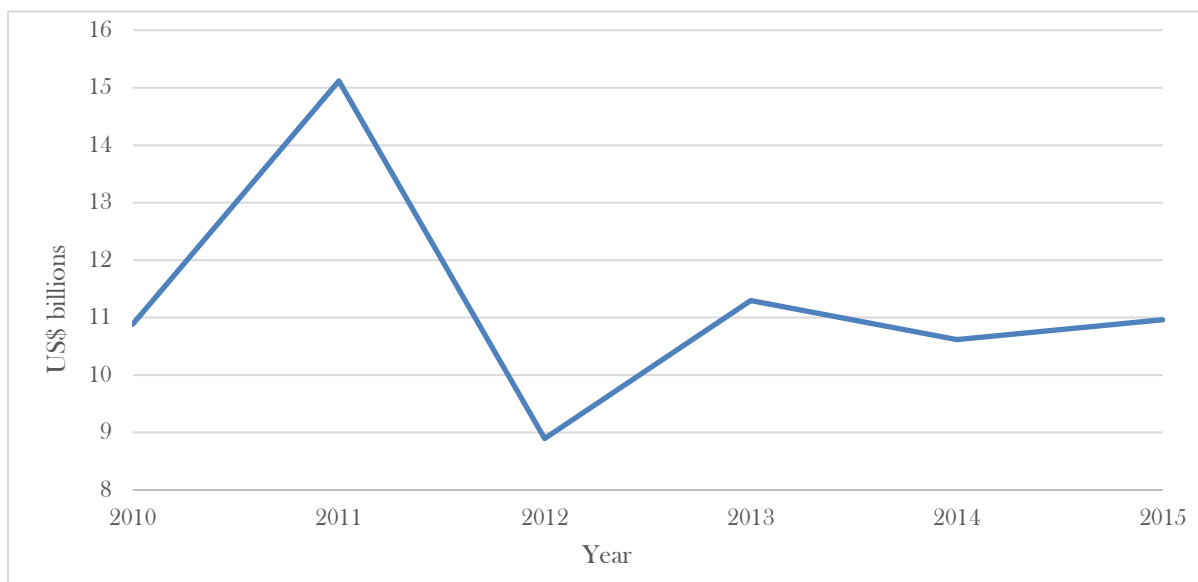


Figure 1. Malaysia Net FDI Inflow (US\$), 2010-2015. Data: World Bank

Experts suggest that the Malaysian government remains one of the most problematic in the region from a tenure governance perspective. Two different land laws govern Western (Peninsular) and Eastern (Sabah and Sarawak) Malaysia. Large-scale corruption in land concession deals are more pronounced in the East than the West. Former Sarawak Chief Minister Abdul Mahmud Taib was placed under investigation in 2011 after companies with whom he had close ties sold government-recognized and protected indigenous lands.⁷

⁵ The World Bank, "GDP per capita (current US\$)," <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=MY>; Trading Economics, "Malaysia | Credit Rating," <http://www.tradingeconomics.com/malaysia/rating>.

⁶ Y-Sing Liao and Yumi Teso, "Malaysia's Ringgit Crackdown Spooks Overseas Investors," <https://www.bloomberg.com/news/articles/2017-02-06/malaysia-s-ringgit-crackdown-saps-volatility-deters-investors>, Bloomberg Markets (February 7, 2017).

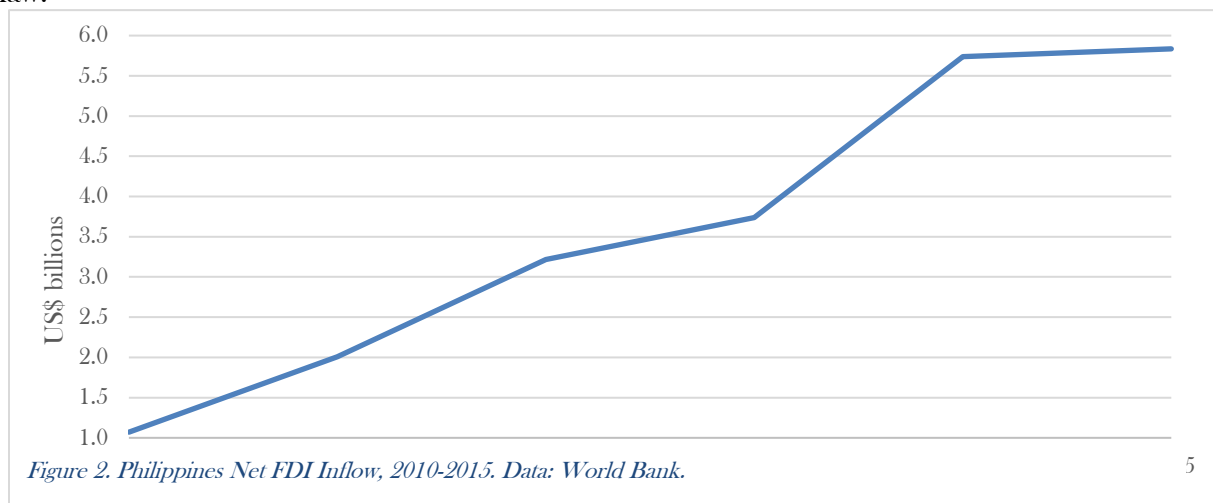
⁷ Florence Looi, "Undercover sting exposes Malaysia land-grab," <http://www.aljazeera.com/indepth/features/2013/03/2013318131755948174.html>, Al Jazeera (March 19, 2013).

Additionally, public participation in the Malaysia Land Administration System is not widespread.⁸ The gaps in regulation that arise from the duplication of responsibilities and lack of coordination among the various governing bodies thus leave ample space for abuses.

The rate of tenure dispute in Malaysia also appears to have abated over recent years after a sharp peak related primarily to palm oil expansion. Most of the cases we found began over five years ago, although only two have been resolved. Most of these cases are related to the interlinked issues of logging and plantation agriculture but there is also one example in this study from the hydropower sector. It seems likely that the apparent decline in reported disputes is at least partly a result of the crackdown on the press, including the blocking of sites such as *Sarawak Report* which were reporting corruption.⁹

The Philippines

The current administration has put a moratorium on the conversion of land to agriculture but the overall impact of 2016's change of political direction remains unclear. Foreign investment in land holdings is also restricted by the constitution to 40%. Bills filed in 2015 and 2016 sought to ease this restriction. Despite growing net foreign direct investment inflow to the country (see Figure 2 below), these bills have been opposed by left-leaning political parties and have not been signed into law.¹⁰



⁸ Samsudin, S., 2011, "A review of organizational arrangements in Malaysia Land Administration System towards good governance," https://www.academia.edu/7964779/A_review_of_organizational_arrangements_in_Malaysia_Land_Administration_System_toward_s_good_governance.

⁹ The Malay Mail Online, "Up one rung to 146th spot, but Malaysia's global press freedom score worsens," <http://www.themalaymailonline.com/malaysia/article/up-one-rung-to-146th-spot-but-malysias-global-press-freedom-score-worsens> (April 20, 2016).

¹⁰ Increase in Net FDI Inflow from US\$1 billion in 2010 to US\$5.8 billion 2015. In 2016, FDI reached US\$7.9 billion. The 40% increase in 2016 was driven mainly by investments in debt instruments, manufacturing, and real estate. See Rappler.com, "PH ends 2016 with foreign direct investments up 40.7%," <http://www.rappler.com/business/163987-philippines-foreign-direct-investments->

Many recent cases we examined from this country indicated that progress may be faltering. Our study suggests that more scrutiny is needed in the mining sector as well as in land use conversion. Mining of commodities like black sand, which does not attract the major mining firms, is very problematic for land use but also for the ecosystem services that many people rely on.

Some of those whose tenure rights have been impacted by mining in the Philippines have been able to find redress through legal channels and direct action (as happened in relation to the Santa Cruz nickel mine where companies had licenses revoked in 2016). However, security force responses have often been violent, and illegal mining has continued in some areas (such as black sand mining in Cagayan province) in spite of government intervention.¹¹

Barriers to effective governance include problems with the legislature and the titling system, and resistance to land distribution. The Department of Agrarian Reform (DAR) settles disputes and land-grabbing cases and organizes inter-agency task forces to implement land distribution. However, political and business influences prevent implementation on the ground, and legislators who have extensive landholdings or have close ties to large land owners insert provisions into land tenure laws that are essentially loopholes, further undermining attempts at land redistribution.¹²

Indonesia

The Indonesian government's Master Plan, launched in 2011 with the aim of making Indonesia one of the world's ten biggest economies by 2025, encouraged large-scale investment in 22 primary activities, including timber, palm oil, and agriculture.¹³ This contributed to net FDI growth by 25% from 2011 to 2014 (see Figure 3 below).

Part of the economic reform package has been a policy of deregulation, including the easing of restrictions on foreign land ownership and a loosening of administrative procedures.¹⁴ In 2016, the

[full-year-2016](#), Rappler (March 12, 2017) ; The World Bank, "Foreign direct investment, net inflows (BoP, current US\$), <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=PH>.

¹¹ Rappler.com, "SC to Zambales Mining Firms: Prove you're not harming environment," <http://www.rappler.com/nation/137168-supreme-court-writ-kalikasan-zambales-mining-companies>, Rappler (June 28, 2016); Environmental Justice Atlas, "Cagayan black sand mining in shore areas, Luzon, Philippines," <https://ejatlas.org/conflict/cagavan-black-sand-mining-in-shore-area>, [Environmental Justice Atlas](#).

¹² Corrales, C.B., "CARP, CARPER: Failing, falling, dead?" <http://pcij.org/blog/2015/06/11/carp-carper-failing-falling-dead>, Philippine Center for Investigative Journalism Blog (2015); Tadem, E.C., "Philippine Agrarian Reform in the 21st Century," https://www.iss.nl/fileadmin/ASSETS/iss/Research_and_projects/Research_networks/LDPI/CMCP_D2-Tadem.pdf; Cornelia Hett "BICAS et al, 2015, "Land Deals In Laos: First Insights From A New Nationwide Initiative To Assess The Quality Of Investments In Land."

¹³ Cifor, "Land-based investment and green development in Indonesia: Lessons from Berau district, East Kalimantan," <http://www.cifor.org/library/5538/land-based-investment-and-green-development-in-indonesia-lessons-from-berau-district-east-kalimantan>.

¹⁴ Government Regulation No. 103/2015 on House Ownership of Foreigners Residing in Indonesia.

government also announced that there would be further deregulation of 16 key sectors, including agriculture, forestry, energy, and transport.¹⁵

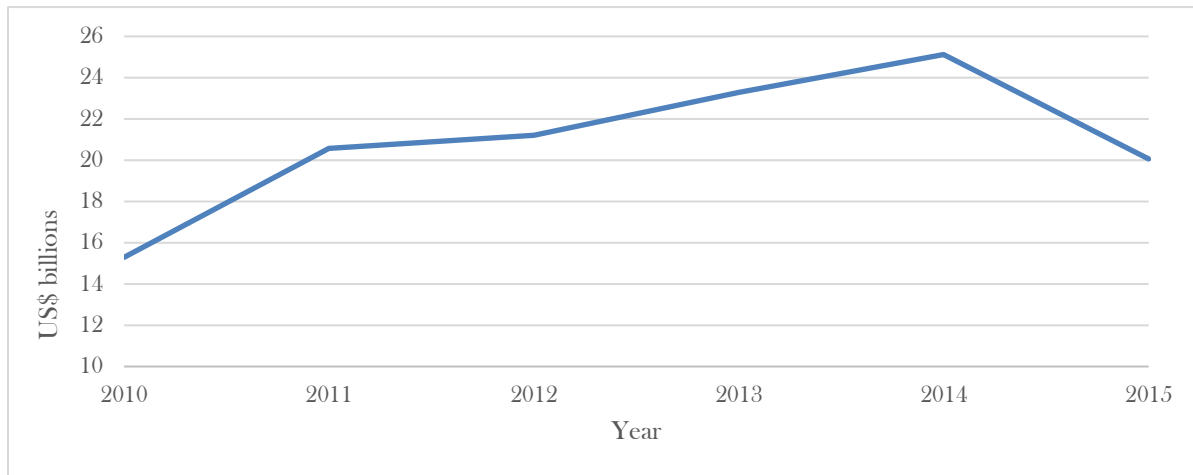


Figure 3. Indonesia Net FDI Inflow, 2010-2015. Data: World Bank

It remains unclear what the impacts of these measures will be on tenure governance in Indonesia, as the government has simultaneously committed to assigning more community ownership of forests and plantations. The tenure context in Indonesia is profiled in more detail on pages 9-10 below, as part of our closer examination of three cases of dispute over palm oil projects. Indonesia has provided more case studies for the global IAN database than any other country, but provides fewer recent cases than the Philippines.

The Indonesian government has one of the poorest records, and faces some of the greatest challenges in the region from the perspective of tenure governance. These challenges are particularly great once the nature of local governments is taken into account. This paper therefore focuses in the next few pages on examining the nature and quality of possible recent improvements in the management of tenure issues in Indonesia.

¹⁵ Kapoor, K., and Chalmers, J., "Indonesia plans "big bang" opening of economy to foreign investment," <http://www.reuters.com/article/us-indonesia-jokowi-idUSKCN0VL0W9>, Reuters (February 12, 2016).

3. Case Study Focus

This section focuses on three tenure-related disputes in the Indonesian palm oil sector. These cases provide a more fine-grained analysis of the dynamics driving tenure disputes in the region, as well as the factors affecting their resolution. It therefore provides a complementary viewpoint to the macro-level quantitative analysis provided in the accompanying [trends paper](#).

Case study selection and rationale

We have chosen to focus on three cases of tenure-related dispute in the Indonesian palm oil sector. The three key cases will be referred to by location as: Kapa, West Sumatra; Kubu Raya, West Kalimantan; and West Kutai, East Kalimantan. The Indonesian palm oil sector is notorious for the social and environmental damage that it causes;¹⁶ this is represented in our selection of

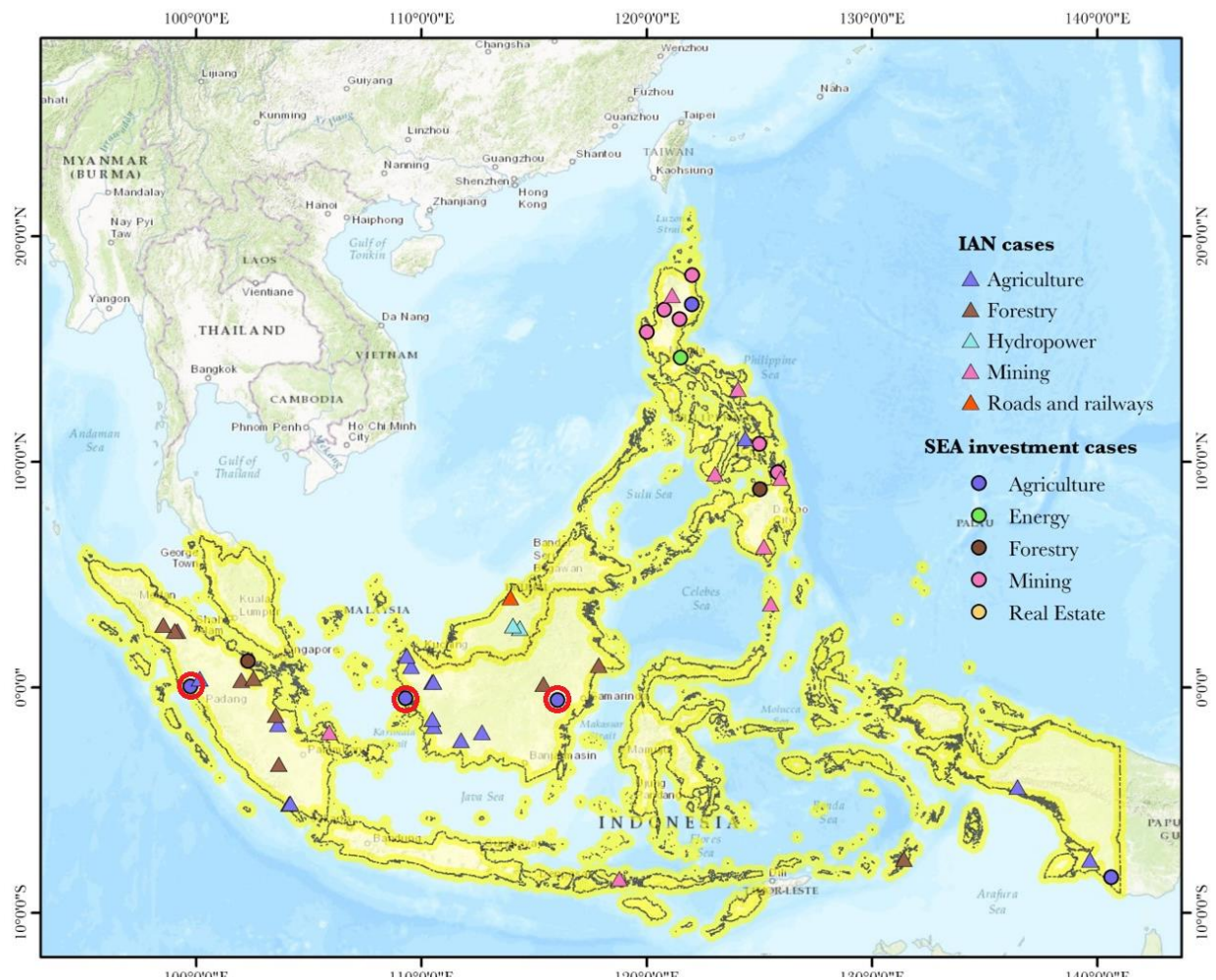


Figure 4. Original IAN and new Maritime Southeast Asia Investment cases, with Indonesia palm oil cases marked in red.

¹⁶ See, for example, a profile in the Guardian newspaper in 2015: Thomasz Johnson, “Palm oil companies exploit Indonesia’s people – and its corrupt political machine,” <https://www.theguardian.com/sustainable-business/2015/jun/11/palm-oil-industry-indonesia-corruption-communities-forests>, The Guardian (June 11, 2015).

cases. These cases capture some key sub-regional issues and complement the sugar cases profiled in the [sister paper to this report on Continental Southeast Asia](#).

The three cases are also diverse, indicating the differences in the way disputes can be handled and in the outcomes they can have for project backers. In at least one of our cases, there are some signs that the judiciary, the RSPO, and the companies involved recognize the need for more secure tenure rights, better local engagement processes, and to return land that was unfairly taken from local peoples. However, we can also see that the expansion of palm oil has created and exacerbated disputes by displacing people, curtailing their access to resources, and causing environmental damage.

Looking across our three cases, we see significant variation in the way that local government actors handled disputes. This may reflect the relative importance of police, courts, and other branches of government, as well as power dynamics between local communities, their representatives, and the representatives of central government. We can also see the way that different levels of social cohesion among local peoples have influenced the way that disputes evolve.

Besides highlighting some of the key factors that can change the way disputes develop and impact companies, our review of the three case studies notes some important takeaways for the palm oil industry globally, as well as broader conclusions for land-based investments.

First, they highlight some of the typical weaknesses of industry bodies, as well as their value in the dispute resolution process. A major difficulty for sustainability partnerships is that their growth and development depends on large industry players.

Effectiveness is limited by vague sustainability criteria that lack operational meaning, while implementation of these standards is hampered by a lack of knowledge, motivation, and good governance inside companies.¹⁷ Voluntary partnerships are thus limited in their ability to enforce high standards by the ambition and capacity of their members, whose interests generally tend toward the minimal cost needed to satisfy the market that sustainability is being achieved.

Second, the cases show that weak governance and distrust of state institutions can lead to a preference among local peoples for non-legal modes of opposition even where these legal avenues may have value. Participants of resistance movements have an obligation: “where state law fails, the individual is obliged to act.”¹⁸

¹⁷ Jordan Nikoloyuk, Tom R. Burns and Reinier de Man, “The promise and limitations of partnered governance: the case of sustainable palm oil,” <https://mahb.stanford.edu/wp-content/uploads/2013/01/The-promise-and-limitations-of-partnered-governance.pdf>, Stanford, (October 30, 2009).

¹⁸ Wendy Adams, *Popular Culture and Legal Pluralism: Narrative as Law*, (Routledge, 2016), 121, https://books.google.com.ph/books?id=3QxqDAAAQBAJ&dq=direct+action+when+law+fails&source=gbs_navlinks_s; The World Bank, 1993, “Power, Distortions, Revolt, and Reforms in Agricultural Land Relations,” <http://documents.worldbank.org/curated/en/304261468764712147/pdf/multi-page.pdf>.

Overview

Disputes driven by the Indonesian palm oil sector, and overwhelmingly by displacement of local peoples, have been documented since at least 1985, with the majority of cases in the IAN database occurring since 1997.¹⁹ This coincides with growth in the Indonesian palm oil sector, which grew every year from 1997 to 2014, from 5 million to 33 million tonnes annually. In 2014, growth slowed when the moratorium on new concessions in forest and peat lands announced in May 2011 started to come into force.²⁰

These cases highlight the complications of legal pluralism in Indonesia where state laws and customary (*adat*) rules provide potentially conflicting legal frameworks. The various interpretations of these frameworks by different authorities have resulted in markedly divergent outcomes for companies and communities. The overlapping land claims that result from these systems can lead to environmental degradation, disempowerment of communities, and stalled investments.²¹

Resolutions like those seen in Sumatra, where the RSPO recently ruled that an independent mapping process should form the basis for a new agreement between the company PT PHP and the affected community (see pages 11-12), are highly unlikely to affect the situation on the ground without additional leverage or attention in favor of the community. Without these incentives, legislative ambiguity and gaps in the enforcement and administration of regulations allows for companies to effectively ignore land claims from disempowered local communities.

Given the limitations of the legal system in Indonesia, many indigenous peoples and local communities feel that dispute resolution is best achieved outside the courts. In March 2017, seven Papuan NGOs released a declaration advising that affected communities and civil society organizations “should try to reach legal settlements without going through the courts and should engage in local, regional, national, and international advocacy campaigns.”²²

Because palm oil in Indonesia is a well-established industry, civil society and government have to some extent been able to develop appropriate local responses. As a result, local peoples will often

¹⁹ An interesting development in terms of the effects of displacement is for local communities to be “enclaved” within concession areas, and become part of plasma schemes (in which businesses develop land before distributing it to local communities for management and harvest) or other types of partnerships that allow the company to expand its operating area.

²⁰ This amounts to an average annual growth of 11% (data from Index Mundi, 2017, accessed at: <http://www.indexmundi.com/agriculture/?country=id&commodity=palm-oil&graph=production>); Palm oil production growth continued from 2012-2016, giving an annual average growth of 6.52% for that period. The Moratorium’s exemption for existing concessions likely accounts for the delay in impact on palm oil production (see World Resources Institute, 2012, “Indonesia’s Moratorium on New Forest Concessions: Key Findings and Next Steps,” http://www.wri.org/sites/default/files/indonesia_moratorium_on_new_forest_concessions.pdf for a more detailed analysis of the challenges faced by the regulation).

²¹ An indication of these overlaps is provided by a series of interactive maps released by Greenpeace in 2016: Greenpeace, <http://www.greenpeace.org/seasia/id/Global/seasia/Indonesia/Code/Forest-Map/en/index.html>.

²² Forest Peoples Programme, “Papuan activists appeal to Indonesian President to halt violations by forestry and plantations companies,” <https://www.forestpeoples.org/en/climate-forests-legal-human-rights-palm-oil-rspo/report/2017/papuan-activists-appeal-indonesian>, Forest Peoples Programme, (March 2, 2017).

use a combination of direct action, legal action, and formal complaint processes to halt and reverse palm oil projects while formalizing their claims to land. But the highly decentralized nature of the Indonesian political system has made this progress slow and piecemeal as Ministries and local authorities have come into conflict with themselves, each other, and the people that they represent.²³

The Indonesian government has certainly made strides toward improving its regulations relating to tenure, particularly with regards to the rights of forest peoples. Constitutional Court decision MK35 ruled that customarily owned forests did not fall under the category of state forests, and instead belonged to indigenous peoples. In theory, the ruling it followed—MK 45—had already left room for negotiations that would allow communities and local peoples to get their lands and forests formally recognized, rather than classified as State Forest Areas.²⁴

As such, at least 40 million hectares of customary forests could potentially be recognized as community or personal land based on indicative maps of indigenous territories. But local peoples are still waiting for the Ministry of Environment and Forestry (MoEF) to provide an adequate, accessible procedure to make this process effective, as the existing procedure is too complex. The first indigenous forests were recognized by the MoEF in 2016. However, the MoEF has also accelerated the process of gazetting forest without the legally-required consultations with rights-holders, thereby effectively precluding any progress on rights.²⁵

Similarly, the agrarian ministry passed Permen Agraria 10/2016, which allows communal rights (hak komunal) to be recognized in forests and plantations.²⁶ If implemented, this reform could cover over 9 million hectares of land (this is the government's 2019 target under the Agrarian Reform agenda for land redistribution and asset legalization), and would provide a tool to prevent disputes between palm oil developers and communities. However, implementation of the law has been slow.

The Hak Guna Usaha (HGU) licensing process has been a major regulatory factor contributing to dispute. The HGU is a Land Use Rights permit, akin to a long-term lease, that provides operational rights for 35 years. Currently, companies can only legally secure oil palm concessions

²³ Fitriani Ardiansyah, Andri Akbar, and Marthen Nur Amalia, 2015, "Forest and land-use governance in a decentralized Indonesia - A legal and policy review," http://www.cifor.org/publications/pdf_files/OccPapers/OP-132.pdf, CIFOR.

²⁴ Phillip Wells, et. al., 2012, "Indonesian Constitutional Court Ruling Number 45/PUU-IX/2011 in relation to Forest Lands Implications for Forests, Development and REDD+," http://theredddesk.org/sites/default/files/policy_brief_constitutional_court_decision_no_45_puuix_2011.pdf.

²⁵ Land Governance for Equitable and Sustainable Development, "Food Security and Land Governance Factsheet: Indonesia," <http://www.landgovernance.org/assets/20160627-Factsheet-Indonesia.pdf>, LANDac.

²⁶ (In Indonesian) Sapariah Saturi, "Kado Manis Akhir Tahun, Kali Pertama Pemerintah Tetapkan Hutan Adat," <http://www.mongabay.co.id/2016/12/29/kado-manis-akhir-tahun-kali-pertama-pemerintah-tetapkan-hutan-adat>, Mongabay Indonesia (December 29, 2016).

on unencumbered state lands. Therefore, when companies secure HGU, the state is in effect legally extinguishing any customary land claims over these territories.

The fact that “the permits permanently extinguish communities’ land rights, as after an HGU permit expires the land reverts to the State and does not go back to the people” may also contribute to the regularity with which they feature in tenure disputes in Indonesia.²⁷

In summary, while there are definite improvements in the regulatory framework, implementation is lacking. Enforcement of regulations may be further hampered by the decentralized nature of the Indonesian political system in which the central government has limited authority over local officials who view themselves as in competition to attract investment quickly.

This is not to say that gaining local land titles is unimportant, nor that decentralized governance is necessarily bad for tenure. The historical impacts of authorities exploiting contradictions between (and loopholes within) national and local regulations should be balanced against the important achievements of local government. More customary communities, lands, and forests have been recognized at the sub-national level than by the central government.

More must be done to speed up the process of recognizing local rights to land—and closing loopholes in regulation—if disputes are to be avoided and resolved effectively by private sector actors. At the same time, private sector actors must recognize the risk of delay, legal action, and concession renegotiation associated with the current state of implementation of the regulatory framework. Both direct action and regulatory intervention can grind operations to a halt, or even result in the loss of assets.

Renegotiating concessions can be a drawn-out process, and invite further confusion and competing land claims. Winning local approval at an early stage can help companies avoid these risks. By securing community approval for the project early on, companies and investors can mitigate the risk of costs imposed by both regulatory and direct action. Involving local peoples early in the process also makes the establishment of property boundaries quicker, more accurate, and less prone to later disputes.

Case Study Timeline

The graphic below presents a simplified version of the sequence of key events in the three cases. The cases feature the Kapa community in West Sumatra, villagers of Olak-Olak Kubu, in Kubu Raya Regency in West Kalimantan, and Muara Tae and Muara Ponak villages in West Kutai, East Kalimantan. The cases in question are highly controversial and have been reviewed in numerous reports.²⁸

²⁷ Marcus Colchester, via Mongabay: Rachel Diaz-Bastin, “Wilmar grabbed indigenous lands in Sumatra, RSPO finds,” <https://news.mongabay.com/2017/02/wilmar-grabbed-indigenous-lands-in-sumatra-rspo-finds> (February 16, 2017).

²⁸ For Kubu Raya, West Kalimantan, see: Institute for Policy Analysis of Conflict, “Anatomy of an Indonesian Oil Palm Conflict,” http://file.understandingconflict.org/file/2016/08/IPAC_Report_31_Oil_Palm.pdf, IPAC Report No. 31, (August 31, 2016); for

As with many cases of protracted dispute, getting a fair and accurate portrayal of events can be difficult. By providing a simple statement of facts, we hope to provide the basis for a balanced assessment. Providing this timeline offers a picture of how the disputes developed while also giving a sense of which events had serious repercussions.

Year	Kapa, Sumatra	Kubu Raya, West Kalimantan	West Kutai, East Kalimantan
1997	February: Customary leaders agree to hand over customary lands, with knowledge of village heads.		
2000	Provincial government abolishes village government system which had previously had responsibility for land allocation.		
	Police reportedly intimidate Kapa peoples into surrendering land.		
2003	Police forces enter community land to protect land clearance.	PT Sintang Raya obtains a concession for palm oil over 13,500 hectares covering three villages. ²⁹	
2004	District government forms conflict settlement team.	PT Sintang Raya obtains a “location permit” covering 20,000 hectares over five villages.	
	October: HGU for 1,600 hectares issued for 30 years by National Land Agency.		
2005	Wilmar joins RSPO.		
2006	Land conflicts in Nagari, Kapa.		
2007			Center for International Forestry Research finds that environment and social welfare on West Kutai

West Kutai, East Kalimantan: Philip Jacobson, “Inside Indonesia’s highest-profile land conflict,” <https://landportal.info/news/2016/02/inside-indonesia%E2%80%99s-highest-profile-land-conflict>, landportal.info; for West Sumatra Christopher Fon Achobang, et. al., November 2013, “Conflict or Consent? The oil palm sector at a crossroads,” <http://www.synchronicityearth.org/assets/uploads/conflict-or-consent.pdf>.

²⁹Institute for Policy Analysis of Conflict, 2016, “Anatomy of a An Indonesian Oil Palm Conflict,” http://file.understandingconflict.org/file/2016/08/IPAC_Report_31_Oil_Palm.pdf.

			were sacrificed for the extractive economy.
2008		Letter from village head releases land to PT Sintang Raya.	
2009		PT Sintang Raya gains an HGU.	
2010			PT Borneo Surya Mining Jaya (BSMJ), a subsidiary of First Resources Ltd, is granted a permit to acquire land from owners.
2011		Three farmers, supported by a farmers' union and a rival palm oil company, file a case against PT Sintang Raya for grabbing land for which they had titles. The total land claimed was 5 hectares.	Forest clearance permits for plantations PT Munte Waniq Jaya Perkas, subsidiary of TSH Resources Bhd. PT BSMJ presented to Muara Tae and the village responded with a letter detailing its borders to avoid conflict.
2012	10 community leaders state in a meeting that their hamlet was not consulted in the decision-making process.		Forest clearance for plantations by PT BSMJ.
	December: RSPO Stage 1 assessment of PT PHP-I plantations. ³⁰		October: Environmental Investigation Agency (EIA) submits a grievance to RSPO against PT BSMJ about forest clearance in Muara Tae without community consent.
2013	PT PHP-I is planning High Conservation Value Assessments. 25 February to 1 March: RSPO Stage 2 Assessment.		Muara Tae's elected chief is stripped of office by decree of the regent because the former resisted the redrawing of village boundaries to enable the sale of community land to the companies.
2014	March: National Land Agency measures land of Nagari Kapa along with residents and PT PHP1 employees. Kapa leader object to the results, alleging	Supreme Court orders PT Sintang Raya to return 5 hectares to the community. Union then claims that the entire concession is void, prompting mass pickings	

³⁰ Mutu Certification International, April 2014, "PT Mutuagung Lestari Assessment Report – Roundtable on Sustainable Palm Oil Certification,"

https://www.rspo.org/uploads/default/pnc/PT_Gersindo_Minang_RSPO_Initial_Assesment_Report_of_WILMAR_Int_Ltd_.pdf

	<p>that the process was not transparent.³¹</p> <p>October: Community files a complaint against Wilmar for establishing a plantation while violating Indonesian laws and RSPO rules.</p> <p>November: Meeting between Wilmar and community in Kuala Lumpur. The company says it will explore other legal options, but then proceeds with gaining an HGU.</p>	<p>of fruit from the concession by villagers. The company files theft charges against villagers.</p>	
2015	<p>March: RSPO preliminary decision that PT PHP1 complied with the law when it applied for an HGU. It also recommends that the communities resolve land conflicts with the government. This decision is contested by Gampo Alam, a community leader.</p> <p>May: Gampo Alam is jailed for misappropriating community funds. Forest Peoples Program protests, saying it was Wilmar who was behind the arrest.³²</p>		<p>6 March: RSPO brings mediation to a close after the EIA and Muara Tae refuse to actively participate in the process.³³</p>
2016	<p>June: Complainants, Wilmar, and RSPO agree to hire an independent assessor to resolve the dispute.</p>	<p>24 February: Protest rally held by residents against the company.</p> <p>9 July: Protest of residents by harvesting oil palm within the plantation area.³⁴</p>	

³¹ Roundtable on Sustainable Palm Oil, “Case Tracker PT Permata Hijau Pasaman 1 (Wilmar International Ltd),” <https://www.rsपो.org/members/complaints/status-of-complaints/view/76>, RSPO.

³² Vaidehi Shah, “RSPO rules on community complaint against Wilmar unit,” <http://www.eco-business.com/news/rsपो-rules-on-community-complaint-against-wilmar-unit>, Eco-business (February 8, 2017).

³³ Ravin Krishnan, “Re: The complaint lodged by Environmental Investigation Agency (EIA) against PT Borneo Surya Mining Jaya (PT BSMJ)/ First Resources Limited (FR) on 18 October 2012,” www.rsपो.org/files/download/21404f3392cf009 (March 6, 2015).

³⁴ Severianus Endi, “Hundreds leave home in palm oil conflict,” <https://www.pressreader.com/indonesia/the-jakarta-post/20160802/281556585200222>, The Jakarta Post (August 2, 2016).

		<p>23 July: 400 residents protest and occupy an area of the company's concession.</p> <p>August: Company suddenly returns 55 hectares to the community.</p>	
2017	<p>1 February: The RSPO rules that Wilmar must obtain the community's free and prior consent before applying for an HGU.</p>		

Case Study Narrative: Kapa, West Sumatra

The concession in question in this case—1,600 hectares in West Pasaman Regency in Western Sumatra—was first approved by the Regent in 1998.³⁵ Wilmar gained a stake in the plantation management company, PT Permata Hijau Pasaman (PT PHP), in 1999.

Disputes with the local people of Kapa have been ongoing since at least 2000, when police reportedly intimidated communities into surrendering land to PT PHP and another palm oil company.³⁶ In 2003, police forces entered the community's land to protect land clearance measures. The following year, the district government formed a conflict settlement team to facilitate dialogue and mediate disputes, but a lasting resolution was not found.³⁷

In 2012, an assessment by the RSPO noted that there were ongoing land disputes with the Kapa village community. However, the plantations were nevertheless awarded certification in 2014, following a subsequent assessment in which the Chairman of the Kapa Village Cooperative Unit said the disputes were over.³⁸

In October 2014, the Kapa community filed a complaint with the RSPO against PT PHP / Wilmar on two main grounds: objections to the process of land measurement carried out in the village in March 2014, and a rejection of PT PHP's application for an HGU certificate.³⁹

³⁵ Christopher Fon Achobang, et. al., "Conflict or Consent?"

³⁶ There were reports by community members and a local NGO of "shootings, kidnappings, arrests and torture by the armed forces," Milieudefensie / Friends of the Earth Netherlands And Sawit Watch Indonesia, 2004. See also International Working Group for Indigenous Affairs, "Indigenous Peoples in Indonesia," <http://www.iwgia.org/regions/asia/indonesia>.

³⁷ Achobang, "Conflict or Consent?"

³⁸ Mutu Certification International, "PT Mutuagung Lestari Assessment Report."

³⁹ Roundtable on Sustainable Palm Oil, "Case Tracker PT Permata Hijau Pasaman 1 (Wilmar International Ltd)."

In February 2017, the Complaints Panel of the RSPO⁴⁰ ruled that PT PHP must measure the disputed land with a participatory land mapping process conducted by an independent expert, with the results brought to the National Land Agency, and renegotiate the partnership between the Kapa community and the company.⁴¹

The case is notable for the efficacy of RSPO's involvement, not only in successfully getting all parties around a negotiating table, but also in producing a result that, so far, both parties appear happy with.⁴² The dispute has taken a long time to reach this resolution, but it appears that the involvement of an independent third party catalyzed a settlement in less than three years for a conflict which had been underway for more than 14. This is a notable success for the industry body, but the process was still too slow and this kind of result from RSPO involvement is not necessarily the norm. Just as there are examples of disputes being resolved rapidly and effectively through the conventional judicial process, this instance does not yet represent a national trend.

For instance, in 2012, a 7,800 hectare concession was granted to PT Inti Citra Agung (PT ICA). Due to opposition from villagers, PT ICA was only able to obtain 700 hectares for \$430/hectare in 2014. In this case, the courts identified local peoples' food security and their right to land as important human rights.⁴³ The fundamental dependence of people on the land for their nutrition was an important factor in the decision to uphold the community's claim to the land. It should also be considered in light of the Indonesian government's drive to self-sufficiency in certain key food crops, in this case rice.

From PT ICA's point of view, the outcome of the case was undoubtedly not the decision they were seeking. However, rather than a lengthy, violent, or otherwise costly conflict with their neighbors, the company was able to operate a smaller concession without interruption and invest in other areas rather than in protracted legal battles or mediations.

⁴⁰ Roundtable on Sustainable Palm Oil, "Complaints Procedure Flowchart," <http://www.rspo.org/publications/download/115b2a4f00c86e8>.

⁴¹ Tiur Rumondang, "Re: Complaint Case lodged by Forest People Programme and Community of Nagari Kapa against PT Permata Hijau Pasaman I," http://www.forestpeoples.org/sites/fpp/files/news/2017/02/Decision%20letter%20Feb2017_PT%20PHP%20vs%20Kapa%20Complaint%20Case.pdf. Roundtable on Sustainable Palm Oil, (February 1, 2017).

⁴² The Kapa's initial response was that they hoped Wilmar would honor the ruling; Forest Peoples Programme, "PRESS: Wilmar has violated the rights of the Kapa indigenous community of West Sumatra, concludes RSPO," <http://www.forestpeoples.org/en/palm-oil-rspo/press-release/2017/press-wilmar-has-violated-rights-kapa-indigenous-community-west>; In a statement made two weeks after the ruling, Wilmar stated that it "respects the decisions of the RSPO Complaints Panel and will act accordingly," (See Rachel Diaz-Bastin, "Wilmar grabbed indigenous lands in Sumatra, RSPO finds," <https://news.mongabay.com/2017/02/wilmar-grabbed-indigenous-lands-in-sumatra-rspo-finds>, Mongabay (February 16, 2017).

⁴³ Satria Eka Hadinaryanto, "Special Report: Palm Oil, politics and land use in Sumatra (Part II)," <https://news.mongabay.com/2014/04/special-report-palm-oil-politics-and-land-use-in-sumatra-part-ii> Mongabay (April 26, 2014).

Case study narrative: Palm oil in East and West Kalimantan

Two additional cases emphasize the divergence in outcomes and evolution of tenure disputes in Indonesia. In Kubu Raya Regency in West Kalimantan, villagers in Olak-Olak Kubu accused PT Sintang Raya of taking their land without notice—a filing with the RSPO in 2015 alleged that the company had acquired the land based on a letter signed by the village head in 2008, without the consent of the indigenous community.⁴⁴ The RSPO closed the case as PT Sintang Raya was not a member.

In July 2014, a vigil was violently dispersed by the police, beginning a process of arrests and a police presence that was perceived as intimidation.⁴⁵ In August, the Supreme Court ordered PT Sintang Raya to return five hectares of land to the villagers; their original suit sought the revocation of the company's rights to the entire 11,320 hectare estate. The villagers took this as an admission that the concession was illegitimate, triggering mass fruit picking and civil action. In 2016, tensions escalated when the farmers' union organized protests against the company, demanding that it honor the 2014 ruling and cease operations.

A high-profile case in East Kalimantan features a very different scenario to those above in that the local community was not united in their opposition to the concession. One village, Muara Tae, accused another, Muara Ponak, of selling their land to outsiders. Two palm oil companies, TSH Resources BHD and First Resources Ltd, were quick to capitalize on the disagreement, and cleared forests for plantations in 2011 and 2012. Further internal divisions followed, with one group of Muara Tae villagers doing business with PT Borneo Surya Mining Jaya.

Here, as in other cases, companies have actively sought to take advantage of their preponderance of information and influence to undermine the interests of local peoples. In most of these cases, the local judiciary and officialdom countenance this behavior, which has forced people to use direct action to protect their rights. As a result, palm oil continues to drive social harm and is exposed to considerable financial and reputational risk.

The growing role of the RSPO provides some encouragement, as does the slow improvement of the Indonesian regulatory framework. However, the private companies waiting for structural solutions may have their patience tested as progress is halting. In particular, efforts are needed to ensure more consistent enforcement of regulation across the country, which is currently limited by vague sustainability rules, lack of knowledge, and lack of good governance within companies themselves.

⁴⁴ Institute for Policy Analysis of Conflict, "Anatomy of an Indonesian Oil Palm Conflict."

⁴⁵ Complaints Panel meeting minutes, October 2015.

4. Recommendations for Companies and Investors

In Indonesia, Malaysia, and the Philippines, one common thread is the state's failure to enforce parts of the regulatory framework that could consistently protect local interests and help people claim land which is legitimately theirs. The slow pace of reform is particularly evident in Indonesia, where the disparity between recent statutes, and the practice of many local governments, combine to create significant regulatory uncertainty and risk.

Governments must do more to ensure that regulations are enforced consistently, but the private sector has a role to play as well. This will require a better relationship with CSOs because the participation of these groups is a necessary condition for accountability. The following recommendations consider how key stakeholders, especially companies and investors, can improve tenure rights and governance, as well as overall financial and economic performance:

- Companies and investors should work directly with local peoples and government to help and speed the process of converting customary rights to formal entitlement. This may result in a reduced concession area, but it can also help avoid uncertainty, disruption, and reputational risk, which is high in periods of concerted concession renegotiation. This approach can also help reassure local and national government officials, who may be in conflict over these issues, about the value of the reform process for economic activity and investment.
- Companies and investors must conduct due diligence of government counterparties, particularly at the local level and in jurisdictions with pluralistic legal systems.⁴⁶ In Maritime Southeast Asia, and Indonesia in particular, the quality of governance (including the judiciary as well as the bureaucracy and elected officials) varies significantly across provincial borders. Where the judicial system is ineffective, local peoples tend to use other methods to protect and further their interests, including direct, violent action and appeals to third parties.

Conversely, where the judicial system is effective and recent regulation recognized, there is some evidence of disputes being solved rapidly and without significant financial damage to the companies involved. Understanding where government counterparties are reliable can help companies understand where more diligence is needed and where better local engagement processes are required.

- Companies and investors can work with local stakeholders to provide access to independent dispute resolution mechanisms. The RSPO process may be improving, but it is too slow to prevent disputes getting out of hand, and it is also not always seen by local peoples as truly independent. Companies and investors should work with CSOs and international donors to understand how they can finance legitimate mediation and dispute resolution mechanisms.

⁴⁶ For further information on diligence please see: <http://www.tmpsystems.net/ian>.

- Involving local peoples more closely in the impact assessment and reporting process is an affordable and reliable way of addressing tenure and labor rights issues. Participatory monitoring systems increasingly allow detailed project diagnostics at a reasonable price. But they can also help build trust and respect, two commodities that are hard to earn but more important than any other for a nuanced understanding of tenure dispute and risk in Maritime Southeast Asia.
- Companies and investors can address multiple social, environmental, and governance issues through effective local engagement. Local communities are normally the best source of knowledge on what environmental resources are locally sensitive, for example. And a broad-based engagement will provide the best sense of any pre-existing social tensions that an investor or operator would want to be wary of, or of social infrastructure they could help provide. This same broad-based engagement is also the best way to be sure that local leaders who have the legal authority to sign land deals also have the backing of their community.

This paper indicates that the Philippine mining sector is becoming a bigger driver of tenure dispute. As with sectors like palm oil, one reason for local opposition has been environmental damage. These projects have a direct impact on people as they can contaminate the water resources that local peoples rely on. This shows that tenure is about more than land and is often closely tied to leading environmental and social issues.

CSOs must identify the linkages between tenure and the other priorities that companies and investors are trying to deal with. There should not be a conflict between the pressures on companies to avoid deforestation and to respect tenure rights.

Likewise, companies should not see issues like tenure and labor rights as completely distinct issues when the solutions can often be tied together through effective local engagement. Involving local peoples in impact assessment and reporting can help square this circle, making use of local knowledge to manage land profitably and equitably. And as with any investment in land, treating local peoples as a reasonable and empowered counterparty in the deal can help companies to protect the stability and public profile of their operations.

Appendix I: Methodology

This paper looks at 21 recent cases of tenure dispute in Maritime Southeast Asia, identified as part of a research project which analyzed 51 tenure disputes in the wider region. These were drawn from a diversity of sectors, including agriculture, mining, hydropower, and forestry. We determined key trends in the region by comparing these cases with a set of 237 global cases from the IAN Case Study Database.

The methodology for this analysis followed a four-step process designed to produce a large but robust sample of cases for comparative purposes as well as a handful of key cases for in-depth investigation. These four steps involved: compiling a long-list, cutting this down to a short-list, filling out key details, and then executing comparative analysis.

1) Creating a long-list

As a first step, we scoured a variety of sources—including academic papers, conflict databases, news reports, and CSO studies—to find as many cases as we could. In addition, we asked participants in the consultation process to identify any cases they thought should be included.

These cases were compared with the IAN database to avoid duplication. We also applied criteria to ensure that this body of cases was recent and relatively diverse. We concentrated on disputes that were less than 10 years old or which had reignited recently. We did not set a quota for the search or for the number of cases that should come from any country or sector. However, we did try to find at least one case from each national context.

Our long-list of cases eventually came to about 50 examples that were not included in the IAN database. A large proportion of these cases were suitable for further analysis.

2) Reducing to a short-list

The first task in this step was to ensure that none of the cases we had were too old and that all of them related to a tenure dispute between private actors and local peoples. We also excluded some urban tenure disputes with very different dynamics to the sectors examined in this paper.

The next, much more complicated task was establishing whether sufficient and reliable data was available to enable the analysis that would be executed in Step 4. Where data was meagre or where it conflicted to a degree that made it very difficult to construct a consistent narrative, the case was omitted. This was by far the most common reason for removing cases from our short-list.

This process of vetting is a necessary condition of meaningful and reliable analysis. However, we do note some practical implications of this approach. First, the most recent cases often have to be excluded; second, we are seeing what is reported rather than what is happening; third, the large number of disputes involving the government or state-owned companies are not included.

3) Second pass investigation

With a complete list of cases, we initiated the process of pulling out the key characteristics of the cases. This followed the same analytical process as used in creating the IAN case study database. A team of 3 researchers worked independently and then cross-verified results at the end of the process. These results were then verified by a fourth senior researcher.

In addition, for each case we created a geospatial profile using the IAN Risk database. These profiles have been based on average social and environmental indicator values for a 50 kilometer area around the conflict site. Indicators include: land use type; soil quality; water stress and variability; exposure to climate change; population density; poverty and social welfare; access to basic services (food, water, energy); and instances of social conflict.⁴⁷

4) Final Trends Analysis

The final step simply involved comparing the results of Step 3 at different levels. We compared Continental and Maritime Southeast Asia, and we also compared the results with the averages for other regions that figure in the IAN Case Study Database. This did not involve any complex statistical processes and was a straightforward like-for-like exercise.

The results of the trend analysis are available in a companion [report](#) to this paper.

⁴⁷ More information can be found about these indicators and the data used for them here: [IAN Technical Note](#).

Appendix II: Expert Consultation

Name	Institution	Areas of Interest
Scott Poynton	TFT	Palm oil and Indonesia
Marus Colchester	FPP	Indigenous Peoples, forests and tenure in Maritime Southeast Asia
Anne-Sophie Gindroz	RRI	Indonesia, Indigenous Peoples
Paulo Limcaoco	LGT Investment	Land investment in the Philippines
Andiko Mancayo	AsM	Lawyer
Petra Meekers	Musim Mas	Environmental and social impact assessments
Tony Hill	Proforest	Conservation and smallholders
Fitrian Ardiansyah	IDH	Regulation and forest protection
Don Johnston	Bank Andra	Tenure and access to finance

Appendix III: Case Study Data Summary

A complete set of the cases analyzed in this paper can be accessed using the link below:

<https://docs.google.com/spreadsheets/d/1xAzrVKJRB4ibAxV4Qb7O7hF4McZIKKmMdwNfUeJrKk/edit?usp=sharing>