

PT Permata Hijau Pasaman I and the Kapa and Sasak peoples of Pasaman Barat, West Sumatra

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Introduction

PT Permata Hijau Pasaman I¹ (PT PHP I) is a member of the Wilmar group, which joined the RSPO in 2005. This concession was selected as one of seven study areas in Indonesia due to a range of factors, including the availability of academic expertise and existing studies, contacts with a local NGO partner and a local organiser, and expressed concerns by affected communities about the land acquisition process. The main issues identified in the field study are: unresolved disputes with the impacted Kapa communities that date back to the time when the government obtained release of their lands; ongoing disputes with regards to the failure of the government and company to involve all rights-holders in the land acquisition process and; disputes over the plasma areas. Also identified in the study are legal questions concerning the commencement of land clearance and planting before PT PHP I obtained environmental and land

■ *Gateway to PT PHP I concession. The Nagari Kapa village of Talao Pagang is surrounded by the concession and villagers must pass by this gate to enter or leave their village.*

use licenses (AMDAL and HGU). PT PHP I is yet to be certified by the RSPO, and is currently planning to conduct High Conservation Value (HCV) assessments and fulfil other RSPO requirements before being assessed for certification.

Area in question

The concession of PT PHP I is located in the district of Pasaman Barat, West Sumatra, on the western coast of the island of Sumatra. The size of the company plantation in Pasaman Barat district is of 1,600 ha.² The area is composed of swamp lands which were cleared and drained at the beginning of the operations. Areas of farm land were also included in the concession. The concession

is close to the coast, and includes mangrove forests and wetlands on peat soils. The drainage of these areas and agricultural run-off from the plantations have caused significant impacts on the adjacent swamps, leading to loss of livelihoods for Kapa families who used to harvest fish, crabs and shrimp from these areas.

West Sumatra covers an area of 42,130.82 km². Geographic features of the region include plains, mountainous volcanic highlands formed by the Barisan mountain range that runs from north-west to south-

east, and an offshore island archipelago called the Mentawai Islands. The province borders North Sumatra, Riau and Jambi to the east and Bengkulu to the south-east. It includes large areas of dense tropical forest, home to a host of species including *Rafflesia arnoldii* (the world's largest flower), the Sumatran tiger, the Malayan tapir and the Bornean clouded leopard. Two national parks are also located in the province: Siberut National Park and Kerinci Seblat National Park. West Sumatra is one of the earthquake prone areas in Indonesia, due to its location on the tectonic slab at the confluence of two major continental plates (the Eurasian plate and the Indo-Australian plate) and the Great Sumatran Fault.

■ Map of West Sumatra

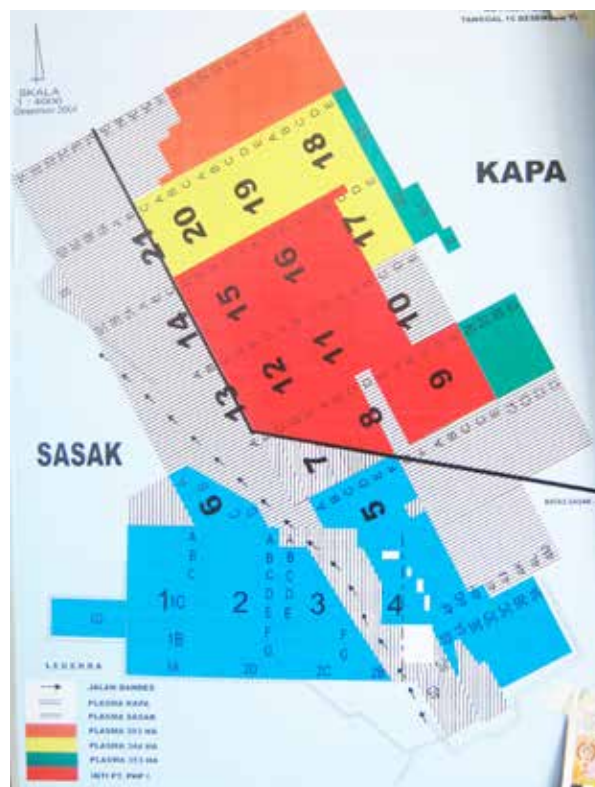


Company Profile

Established in 1992, PT PHP was initially a domestic investment enterprise with shares owned by its founders. In 1999, the company's legal status was changed to Foreign Investment Enterprise (PMA) and its shareholders became foreign entities: Keyflow Limited (British Virgin Islands), Caffrey International Limited (UK), HPR Investment Limited (British Virgin Islands), Banoto Investment Limited (British Virgin Islands), Wilmar Plantation Limited (British Virgin Islands) and PT Kartika Prima Vegetable. The latter's shares were subsequently sold to PT Karya Prajona Nelayan.³

Since it first became involved in the oil palm plantation business in mid-1992, PT PHP has obtained several licenses for concessions, issued by the relevant government authorities. The first one was for a 12,000 ha oil palm plantation concession in *Nagari*⁴ Sasak, Pasaman sub-district, based on the land allocation (*pencadangan lahan*) recommendation of the Regent of Pasaman and the Governor of West Sumatra. In 1995, again with the recommendation of the Regent of Pasaman and the Governor of West Sumatra, the company was granted a permit to set up another 4,000 ha of oil palm plantations in *Nagari* Sikiliang, Pasaman sub-district. Lastly, in 1998, PT PHP re-submitted two proposals for the establishment of a 1,600 ha plantation in *Nagari* Kapa and a 3,500 ha plantation in *Nagari* Maligi, both of which were approved by the Regent of Pasaman.

PT PHP and associated companies hold oil palm plantations and integrated Crude Palm Oil (CPO) and palm kernel oil processing units. Its production capacity is 135,250 tonnes of Fresh Fruit Bunch (FFB) a year, 28,600 tonnes of CPO a year and 6,900 tonnes of palm kernel oil a year. 25% (or 7,150 tonnes a year) of CPO produced by the company goes to the domestic market and 75% (or 21,450 tonnes a year) to the international market. The percentage breakdown is the same for palm oil kernel, with figures of 1,725 tonnes



■ Map of nuclear (*inti*) and plasma estates within the concession of PT PHP I

a year and 5,175 tonnes a year respectively. The total investment of the company is of 42,902,000,000 rupiah (or 4,457,350 USD). The capital source derives from loans (36,773,000,000 rupiah or 3,820,571 USD) and from the company's own capital (6,129,000,000 rupiah or 636,779 USD). The area of the company plantation in Pasaman district is of 5,450 ha.⁵

The indigenous communities of *Nagari* Kapa and *Nagari* Sasak Ranah Pasisir

The concession of PT PHP I overlaps with the customary lands of the indigenous communities of *Nagari* Kapa and *Nagari* Sasak Ranah Pasisir, two neighboring *Nagari* communities in the district (*kabupaten*) of Pasaman Barat but in different sub-districts (*kecamatan*). The former lies in the sub-district of Luhak Nan Dua and the latter lies in the sub-district of Sasak Ranah Pesisir.⁶

Nagari Kapa encompasses an area of 87 km² and *Nagari* Sasak Ranah Pasisir covers

123.71 km². All the land has been used for settlements, oil palm estates and plasma estates set up by the oil palm company, and oil palm estates set up independently by the local communities. No land is left unused. About 10 years ago, the land in the vicinity of Rantau Panjang, a *orong* (hamlet) of *Nagari* Sasak, and the land across from Batang Pasaman were forested but have now been converted into oil plantations by both the company and the local communities. The customary land which is part of the PT PHP I concession was mostly uncultivated and consisted of swamps with sago trees. About 100 to 200 of the villagers used the swamps to catch fish (catfish) and collect rattan. Previously, the rattan had been transported to Padang via Sasak's wharf.

In 2010, *Nagari* Kapa had a population of 18,704 in 4,454 households, and *Nagari* Sasak Ranah Pesisir was home to 13,233 individuals in 3,028 households.⁷ The communities of Kapa and Sasak are customary law (*masyarakat adat*) communities. The original population of both *Nagari* was Minangkabau but the present day population of *Nagari* Kapa is made up of two ethnic groups; the Minangkabau and Javanese (about 300 households). The Javanese first came under the transmigration program in the 1950s and each household was given a piece of land by the customary leader via the district government of Pasaman. The community of *Nagari* Sasak Ranah Pesisir is mostly Minangkabau. In both *Nagari*, the Minangkabau refer to themselves as the *Nagari* Kapa and *Nagari* Sasak indigenous communities and identify themselves as members of Kapa people. The Javanese living in and around *Nagari* Kapa and *Nagari* Sasak are viewed by the government as migrants but are regarded as members of *Nagari* Kapa and Sasak societies by both the Minangkabau communities and themselves.

The language of the Minangkabau is of the Austronesian family with links to the Malay language. Until the 20th century,

the majority of the Minangkabau lived in the highlands, where they practised wet rice cultivation, as well as gathering forest products and trading in gold and ivory. An early Minangkabau figure, Adityawarman, was a follower of Buddhism with ties to the Singhasari and Majapahit kingdoms of Java. He founded a kingdom in the Minangkabau highlands at Pagaruyung in the mid-14th century. In the mid-16th century, the Aceh Sultanate took over the Minangkabau coast, regulating the gold trade and bringing Islam to the Minangkabau people. Contact and trade with Europeans also started in the 16th century. The Dutch East India Company acquired gold at Pariaman in 1651 and up to the early 19th century the Dutch remained content with their coastal trade of gold and produce and made no attempt to visit the Minangkabau highlands. At the beginning of the 19th century, the gold trade began to shrink while agricultural trade expanded, particularly coffee production in the highlands. In February 1958, dissatisfaction with the centralist and socialist policies of the Sukarno administration triggered a revolt which was centred in West Sumatra, with rebels supporting the Revolutionary Government of the Republic of Indonesia (PRRI) in Bukittinggi. By mid-1958, the Indonesian military had put down the rebellion in the major towns of West Sumatra. A period of guerrilla warfare ensued, but most rebels had surrendered by the end of 1961. In the 1960s, Javanese officials occupied most senior civilian, military and police positions in West Sumatra.

Since the distant past, *Nagari* Kapa and *Nagari* Sasak were customary territories, home to the Kapa and the Sasak communities. Each *Nagari* is a social unit made up of customary sub-units called *basa*, *kampung* or *koto*. These sub-units were formed as families grew and broke into smaller groups of kinship or due to migration in search of new agricultural land. After Indonesia's independence, the government determined *Nagari* Kapa and *Nagari* Sasak as both customary and administrative territories. Administratively, both *Nagari* are made

up of a number of *orong*. *Nagari* Kapa is made up of six *orong* (Kapa Utara, Lubuk Pudiang, Malasiro, Kapa Selatan, Kapa Timur and Padang Laweh), while *Nagari* Sasak is made up of seven *orong* (Maligi, Rantau Panjang, Pasalamo, Pondok, Padang Halaban, Pisang Hutan and Sialang).

The Kapa and the Sasak are based on matrilineal kinship groups. The largest kinship group is the tribe (*suku*) whose members belong to their mother's lineage. *Nagari* Sasak consists of seven tribes (*suku*): Jambak, Piliang, Melayu, Caniago, Koto, Sikumbang and Tanjung. Each tribe is led by the tribe chief. Each tribe also has leaders called *datuk*, all of whom are from the Jambak tribe. There are three *datuk* in *Nagari* Sasak: *datuk* Sanaro Mangkuto, *datuk* Basa, and *datuk* Rajo Alam. *Datuk* Sanaro is the head of the *datuk*. Slightly different from the Sasak, the Kapa are made up of tribe-based and *basa/kampung* (village) based kinship groups which are sub-tribe kinship groups. In *Nagari* Kapa, the kinship group with leaders is called *datuk basa/kampung* (village). There are eight *datuk* in *Nagari* Kapa, who are divided into four inner *datuk* and four outer *datuk*. The inner *datuk* are concerned with internal custom and relations within the community, the role of outer *datuk* concerns involvement with outside actors.

Traditionally, the communities in both *Nagari* have chosen and appointed their own leaders. At *Nagari* community level, there is the *pucuak adat*, who is the highest leader. This position is traditionally held by a *datuk*. In addition to the *pucuak adat*, at the *Nagari* level there exists the *Kerapatan Adat Nagari* (KAN), or Meeting of the *Adat Nagari*, which comprises leaders of kinship groups. Being a partner of the *pucuak adat*, KAN makes decisions on customary affairs. KAN is an institution formed later in both the *Nagari*'s history. At the kinship level, there are *datuk* who lead the kinship groups. In *Nagari* Sasak, there are also leaders of kinship groups called *kepala suku* (tribe chief). All these leaders are called *ninik mamak* by the Kapa and the Sasak.

Relations with the State

After Indonesia's independence, the government of Central Sumatra determined *Nagari* as the lowest level of government in West Sumatra. As for other *Nagari* in West Sumatra, the positions of *Wali Nagari* and *Wali orong* were introduced to *Nagari* Kapa and Sasak, and play an important role in the governance of both *Nagari*. Roles are shared between the *pucuak adat* and the *ninik mamak* on the one side and *Wali Nagari* and *Wali orong* on the other. The *pucuak adat* and the *ninik mamak* have authority in managing customary affairs while *Wali Nagari* and *Wali orong* hold administrative authority.

Following the enactment of Law No. 5, 1979 on Village Government, the *Nagari* governance of Kapa and Sasak was abolished and replaced with the village government system. A *orong* became a village and was governed by the village government, and *Wali Nagari* and *Wali orong* were abolished. Despite this, the provincial government of West Sumatra maintained *Nagari* as a customary unit and *Nagari* communities as customary law community units. Under Regional Government Regulation (Perda) No. 13 of 1983, the KAN was determined as the manager of *Nagari* communities and granted authority in customary affairs. Customary affairs concern *ulayat* (customary) land and tribes in *Nagari* Kapa and Sasak. To reconcile the role of the *pucuak adat* with that of the KAN, the district government of Pasaman appointed the *pucuak adat* as the head of the KAN. The handover of the land of *Nagari* Kapa and *Nagari* Sasak by the district government to PT PHP I took place in the period during which the village government system was applied in *Nagari* Kapa and *Nagari* Sasak.

Based on Regional Government Regulation (Perda) No. 9 of 2000 on the Fundamentals of *Nagari* Government, the provincial government of West Sumatra revived the *Nagari* government. In *Nagari* Kapa and *Nagari* Sasak, the

village government system was abolished and replaced with *Nagari* government. Villages were turned again into *orong* and *Nagari* once again became the lowest level of government. After 2000, *Nagari* Kapa and *Nagari* Sasak are led again by the *Nagari* government. *Wali Nagari* and *Wali orong* resumed power in the *Nagari* and *orong* governments. However, the KAN still holds authority in customary affairs (including that over *ulayat* land) along with the *pucuak adat*, who still holds the position of head of the KAN. With the return to the customary system, the dual

government system is still maintained: administrative affairs are governed by the *Nagari* government, and customary affairs, including that of *ulayat* land, are governed by the KAN and the *pucuak adat*.

Analysis of legal documents held by PT PHP I

Since it started its operations in 1992, PT PHP has obtained the following letters and permits:⁸

No.	Types of Letters	No.	Location	Institution/ Agency	Issuance Date
1	Articles of Incorporation of PT PHP	15	Medan	Dradjat Darmadji S. H, Public Notary	11 th May 1992
2	The proposed project for development of oil palm plantation of PT PHP				26 th May 1992
3	Letter of the Governor of West Sumatra concerning Principle Approval for 12,000 ha land allocation	525.26/1477/ Prod-92	<i>Nagari</i> Sasak	The Governor of West Sumatra Province	20 th June 1992
4	The decree of the <i>ninik mamak</i> of <i>Nagari</i> Sasak on agreement to transfer the right over 8,500 ha of Sasak's <i>ulayat</i> land to the State for a concession requested by PT PHP		<i>Nagari</i> Sasak	The <i>ninik mamak</i> of <i>Nagari</i> Sasak	26 th July 1992
5	Letter of the Regent of Pasaman concerning recommendation for 12,000 ha land allocation for PT PHP's oil palm plantation	No. 525.25/1575/ Perek-1992	<i>Nagari</i> Sasak and <i>Nagari</i> Sungai Aur	The Regent of Pasaman	26 th July 1992
6	Company's affidavit	KD.PHP.15/M/ VIII/92			5 th August 1992
7	Letter of Recommendation/ Support of the Head of the Provincial Estate Crops Office of West Sumatra	525.29/986/ 525.3		The Head of the Provincial Estate Crops Office of West Sumatra	24 th August 1992
8	Letter of the Minister of Agriculture concerning Principle Approval for a 9,000 ha oil palm plantation business in Pasaman sub-district, Pasaman district, West Sumatra Province	HK. 350/ E4.651/09.92		The Minister of Agriculture of the Republic of Indonesia	22 nd September 1992
9	Letter of Approval for investment/Principle Approval of the President of the Republic of Indonesia/the Head of BKPM concerning Notification of the President's Approval	117/I/PMA/1993, Nomor Proyek 1110/3115-08-5021		The President of the Republic of Indonesia/ the Head of BKPM	8 th July 1993
10	Decree of the Minister of Justice on Approval for Articles of Incorporation of PT PHP	No.02-266. HT.01.01.TH. 94		The Minister of Justice of the Republic of Indonesia	7 th January 1994

No.	Types of Letters	No.	Location	Institution/ Agency	Issuance Date
11	Letter of the Regent of Pasaman concerning Principle Approval for 4,000 ha Land Allocation for Oil Palm Plantation	525.25/356/ Perek 1995	Sikiliang	Letter of the Regent of Pasaman	31 st March 1995
12	Letter of Principle Approval of the Governor of West Sumatra	No.525.26/2013/ perek-95	West Sumatra	The Governor of West Sumatra	4 th April 1995
13	Application for Location Permit for 5,450 ha of land in Pasaman and Lembah Malintang sub-districts, Pasaman district, for Oil Palm Plantation	KD.PHP.17/P/ VIII/95	Pasaman	PT PHP	August 1995
14	Minutes of the Location Permit Coordination Meeting	No.17/BPN-1995	Pasaman	The National Lands Agency (BPN) of Pasaman	18 th October 1995
15	Decree of the Head of BPN of Pasaman district on Issuance of Location Permit for 3,850 ha of land to PT PHP	402.1144/BPN- 1995	Pasaman	The Head of the National Land Agency (BPN) of Pasaman district	20 th October 1995
16	Letter of approval of the <i>ninik mamak</i> responsible for <i>ulayat</i> land of north and south Kapa in <i>Nagari</i> Kapa concerning the handover of 1,600 ha of the <i>ulayat</i> land of north and south Kapa for PT PHP's oil palm plantation		Kapa	The <i>ninik mamak</i> of <i>Nagari</i> Kapa	6 th February 1997
17	Relinquishment Letter of the <i>ninik mamak</i> of Maligi village, Kenagarian Sasak, Pasaman Tunggal Subdistrict, approved by the Head of KAN Sasak and the district government officials of Pasaman, concerning the handover of 1,400 ha of land for nucleus and plasma estates		Sasak	The <i>ninik mamak</i> of Maligi Kenagarian, Sasak Village, Pasaman Subdistrict	14 th September 1997
18	PT PHP's Application for Location Permit	No.100.A/PHP- PR/Pem-X/1998		PT PHP	17 th January 1998
19	Minutes of the Location Permit Coordination Meeting	No.402.087.1/ BPN-1998		The National Land Agency(BPN) of Pasaman	20 th January 1998
20	Decree of the head of BPN of Pasaman on Issuance of Location Permit for 3,518 ha of land to PT PHP	402. 103/BPN- 1998	Sasak	The Head of The National Land Agency (BPN) of Pasaman district	24 th January 1998
21	Letter of the Regent of Pasaman concerning Approval for Land Allocation	593/3624/TAPEM		The Regent of Pasaman district	23 rd November 1998
22	Letter of the State Minister of Investment/The Head of BKPM concerning approval for change of the company's status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA)	49/V/PMA/1999 Nomor Proyek 1110/3115-08- 012630		The State Minister of Investment/the Head of BKPM	
23	PT PHP's Articles of Association Amendment Deed	NO.11	Deli Serdang	Eddy Simin, SH, Public Notary	3 rd December 1999

No.	Types of Letters	No.	Location	Institution/ Agency	Issuance Date
24	Letter of the Regent of Pasaman concerning Business Location Permit (SITU)	503/55/SITU/C. PAS/2001		The Regent of Pasaman	
25	Large-Scale Plantation Business Permit (SIUP)	No. 207/03.11/SIUP/XI/2002		The Industry and Trade Office of Pasaman district	28 th November 2002
26	Certificate of Company Registration (STDP)	No. 291/03.11/TDP/XI/2002		The Industry and Trade Office of Pasaman district	28 th November 2002
27	Letter of the Regent concerning Endorsement of Environmental Impact Assessment (AMDAL) Documents	008/06/PLH/2004		The Regent of Pasaman	18 th February 2004
28	Decree of the Head of BPN on issuance of Business Use Permit (HGU) on 1,600.725 ha of land in West Pasaman district for 30 years	No.65/HGU/BPN/2004	In the sub-districts of Luhak Nan Duo and Ranah Pesisir	The National Land Agency	4 th October 2004
29	Decree of the Head of BPN on issuance of HGU on 1,014.40 ha of land in West Pasaman district for 30 years	No.76/HGU/BPN/2004	In the sub-districts of Luhak Nan Duo and Ranah Pesisir	The National Land Agency	6 th October 2004

The following section analyses the legality of the land permits used by PT PHP I for oil palm plantation development in the PHP I area and the process conducted with communities to release their lands to the

government for plantation development by the company. The following information is derived from PT PHP I's legal documents and information gathered from interviews with the parties involved.

Legal documents for PHP I plantation area

Legal Obligation of Plantation Operations	Company's Documents	Remarks
a. Acquisition of land rights (1998)		
Letter of Recommendation and Principle Approval for land allocation	Letter of the Regent of Pasaman No. 525.25/356/Perek 1995 concerning Principle Approval for Land Allocation for 4,000 ha Oil Palm Plantation	The Location Permit was based on this letter, although it was effective only a year after its issuance and the Location Permit was not issued until 1998. Note: the company claims to have a Location Permit from 2005 but is yet to provide it to the researchers
Land survey	Document not available/found	
Minutes of the location permit coordination meeting	Minutes of the Coordination Meeting No.402.087.1/BPN-1998	The community members we interviewed stated that they had no involvement in meetings to coordinate issuance of the location permit. The company states it has minutes of such a meeting conducted by BPN
Location permit	Decree of the Head of BPN of Pasaman No.402. 103/BPN-1998 on Issuance of Location Permit for 3,518 hectares to PT PHP	The permit was based on an out-of-date recommendation letter from the Regent. The company states that this applies to PHP II

Legal Obligation of Plantation Operations	Company's Documents	Remarks
Community's agreement on the relinquishment of rights to land	Letter of approval of the <i>ninik mamak</i> responsible for <i>ulayat</i> land of north and south Kapa in <i>Nagari</i> Kapa concerning the handover of 1,600 ha of the <i>ulayat</i> land of north and south Kapa for PT PHP's oil palm plantation in 1997	This approval letter received much criticism from the community of <i>Nagari</i> Kapa as they believed that it was made without the approval of the whole community and that it was detrimental to them
Permit for forest area relinquishment from the Forestry Office	Document not available	There is no clear information whether the land in question was previously a forest area
Map of possessed lands	Location map of PHP I area was obtained from a cooperative	Verification: Electronic map data or clearer map images are needed
Business Use Permit (HGU)	Decree of the Head of BPN No.65/HGU/BPN/2004 on issuance of HGU on 1,600.725 hectares for 30 years	Normally this area is for the nucleus estate but in reality half of it is allocated for the plasma estate. The community still demands a larger plasma estate
b. Environmental Impact Assessment (AMDAL)	Letter of the Regent No.008/06/PLH/2004 concerning Endorsement of Environmental Management Documents	The AMDAL documents of PT PHP I were only prepared in 2003 and approved by the Regent in 2004 although the company had applied for a Business Permit and obtained a Location Permit and conducted land acquisitions for plantation in 1992. This means that for more than 11 years the company did not have AMDAL documents required for its operations. In addition, the community had not been involved in the preparation of the documents. According to the law, the affected community must be asked for their opinion on the AMDAL studies being undertaken
c. Plantation Business Permit (IUP)	Large-Scale Plantation Business Permit (SIUP) No. 207/03.11/SIUP/XI/2002 from the District Industry and Trade Office of Pasaman	The SIUP was issued by the District Industry and Trade Office, although according to the law, an IUP should be issued by the Estate Crops Office. There was no information available to the researchers as to whether an IUP has been issued
d. Company Registration	Certificate of Company Registration (TDP) No. 291/03.11/TDP/XI/2002 from the District Industry and Trade Office of Pasaman	The TDP for PT PHP was only issued in 2002. A TDP is valid for three years, so PT PHP did not have TDPs for at least three consecutive periods prior to 2002. The company claims to have certificates covering the whole period

The legality of a plantation operation in Indonesia is determined by whether or not the company meets all pre-determined legal requirements. As described in the chapter on the National Legal Framework for plantation operations in this volume, there are a number of conditions that must be met. If a plantation operation fails to meet even one requirement, it can be said to be operating without conforming to the law.

For the PHP I plantation area, the company is required to hold the following documents, and to have obtained them in the following order:

- Confirmation Letter concerning Land Allocation from the Governor
- Application for Investment to the Head of BKPM
- Investment Approval, which is also valid as Principle Approval or Temporary Business Permit
- Governor's Decree on Location Permit
- Decree of the Head of National Land Agency or the Head of the Regional Office of National Land Agency on HGU Licensing and HGU Certificate
- Decree of the Regent on Construction Permit (IMB) and Hindrance Act (UUG)/Hinder Ordinance (HO)

- Application to the Head of BKPM for approval on the list of capital goods, raw materials as well as auxiliary materials to be imported
- Decree of the Head of BKPM on Exemption on Import Duty and Other Import Taxes

Concerning the documents held by PT PHP, particularly those relating to PHP I, the researchers were able to obtain the Governor's Confirmation Letter No. 525.26/ 1477/Prod-92 dated 20th June 1992 concerning the land allocation of 12,000 ha in *Nagari* Sasak, Pasaman sub-district, Pasaman district. A careful search for and examination of the other documents failed to identify the BKPM's Letter concerning Approval for Investment, which also serves as Principle Approval or Temporary Business Permit, although the company claims to have the approval letter from BKPM. However, the researchers found the Principle Approval from the Ministry of Agriculture No. HK. 350/E4.651/09.92 dated 22nd September 1992 referring to the existence of:

- Articles of Incorporation of PT PHP
- Proposed Project for Development of Oil Palm Plantation of PT PHP
- Letter of the Governor of West Sumatra concerning Principle Approval for 12,000 ha land allocation
- Company's affidavit
- Letter of recommendation/support of the Head of the Provincial Estate Crops Office of West Sumatra

Under the regulations prevailing at the time, the company should first have had a Principle Approval from BKPM. However, based on the available documents, PT PHP did not possess this document. Therefore, it can be concluded that from a legal viewpoint PT PHP had no legal basis to make investments in Indonesia. Even if we assume that PT PHP I does have the BKPM's Principle Approval, it did not have the Location Permit, the HO Permit and the HGU permit that are required prior to the development of its plantations. From the available documents, the Location Permit

was only obtained in 1995, while the HO Permit and the HGU permit were only obtained in 2002 and 2003 respectively. As a Temporary Business Permit is only valid for one year (the company obtained it in 1992/1993), it is fair to say that PT PHP I does not meet the requirements stipulated by the prevailing regulations, and has therefore not been operating in conformity with the law.

Similarly, if one refers to the Temporary Business Permit issued in 1992 by the Ministry of Agriculture, which required PT PHP to prepare a feasibility study, apply for a HGU, prepare an AMDAL and make periodic reports within a year, it can be said that PT PHP did not meet its obligations as it only began to prepare its AMDAL in 2003 and did not have a HGU until 2003. This means that PT PHP began preparing its AMDAL 11 years after the issuance of Principle Approval by the Ministry of Agriculture and effectively operated for those 11 years without an HGU license.

In 1998, PT PHP applied again to BPN for a location permit. The required documents the company held at the time were:

- Letter of the Regent of Pasaman No. 525.25/356/Perek 1995 concerning Principle Approval for 4,000 ha Land Allocation for Oil Palm Plantations
- Letter of approval dated 1997 from the *ninik mamak* responsible for *ulayat* land of north and south Kapa in *Nagari* Kapa concerning the handover of 1,600 ha of the *ulayat* land of north and south Kapa for PT PHP's oil palm plantations
- Land Relinquishment letter dated 1997 from the *ninik mamak* of Maligi village *Nagari* Sasak, Pasaman Tunggal Subdistrict, acknowledged by the Head of KAN Sasak and the district government officials of Pasaman, concerning the release of 1,400 ha of community lands for nucleus and plasma estates.

Later in 1998, BPN issued a Location Permit for an area of 3,518 ha. The permit was

based on the letter of the Regent concerning land allocation approval in 1995, which was valid for only one year from its issuance date. Therefore, when used as the basis for the Location Permit, the period of validity of that letter had expired. Thus, the location permit issued in 1998 did not conform to the law, and, accordingly, all lands acquired under the permit also failed to fulfill legal requirements. The company claims to have the necessary letters to obtain the permit but is yet to provide them to the research team.

Based on this analysis, PT PHP I is yet to obtain the right to all the lands currently under its control. In summary, the company has not met the legal obligations required by the prevailing regulations, because:

- It did not have a valid Location Permit
- It did not have AMDAL documents as required at that time
- It did not have a HGU license prior to the development of its plantations

The AMDAL documents of PT PHP I were prepared in 2003 and endorsed by the Regent in 2004. This, however, raises legal issues, including the fact that:

- The AMDAL documents prepared in 2003 and endorsed by the Regent in 2004 were out of date in terms of the legal obligations of prevailing regulations. The documents should have been prepared in 1993 at the latest in accordance with the terms specified in the Letter of Principle Approval for oil palm plantations from the Ministry of Agriculture in 1992. The AMDAL was an assessment of the approved 9,000 ha plantation in Pasaman sub-district
- The AMDAL documents should have been issued in three phases, in accordance with the land allocation approval and the location permit issued by the relevant agencies. However, PT PHP only made one AMDAL document covering three land acquisition periods, namely in 1992, 1995 and 1998
- The AMDAL documents issued in 2004 include no record of public participation ie community member signatures approving the AMDAL documents.

- *Plasma area on peat soils adjacent to PHP I concession*



This is contrary to the provision on AMDAL preparation that stipulates that communities must be involved in the preparation of the AMDAL

- AMDAL is required for the issuance of a permanent Plantation Business Permit (IUP). However, PT PHP had received an IUP from the Industry Office two years before it obtained a Regent's letter endorsing its AMDAL. Thus the IUP is invalid because one of the mandatory requirements was not met
- The absence of an AMDAL from 1992 to 2004 means that the entire plantation business activities of PT PHP during that period lacked a legal basis, as an endorsed AMDAL is required for a plantation business to operate. In the case of PT PHP, its AMDAL documents were only prepared in 2003 and endorsed in 2004.

From 22nd September 1992, PT PHP held a temporary Plantation Business Permit issued by the Minister of Agriculture. This temporary permit was valid for one year, entailing a number of obligations that had to be met, namely:

- Preparing a feasibility study
- Processing the HGU
- Preparing an AMDAL study
- Making periodic reports on the business operation

With the issuance of the temporary IUP, the legal issues for PT PHP include:

- The fact that the company did not follow up the issuance of the temporary IUP by fulfilling the requirements specified in the IUP ie preparing AMDAL documents and processing an HGU within a year
- The permanent IUP was only issued in 2002 by the Industry Office, thus for 10 years PT PHP did not hold a permanent IUP as the legal basis for its operations.

Therefore, the operations of PT PHP I failed to conform to the law because the company did not have an IUP between

1992 and 2002. Moreover, the IUP issued in 2002 does not remove the legal duties PT PHP had failed to fulfill during the decade of 1992 to 2002. The legality of the 2002 IUP itself also remains questionable.

The customary land tenure of the Kapa and Sasak

The communities of Kapa and Sasak have their own regulations, authority and land-related conflict resolution mechanisms. In the government's conception, the regulations are called customary laws or Adat while the authority and the conflict resolution mechanisms are called customary institutions or *KAN (Kerapatan Adat Nagari)*. The section below will describe the customary laws and customary institutions of *Nagari* Kapa and *Nagari* Sasak with regard to agrarian resources.

To the Kapa and the Sasak, their territories belong to them. All pieces of land have their respective owners. There are four classifications of land ownership. The first one is customary land, which does not belong to any kinship group in particular but lies within the *Nagari* territory. It is collectively owned by all the communities. Customary land usually comprises forests or swamps not cultivated by the communities. The second type of land ownership is *bosa/kampuang* land. This also usually comprises forests or swamps and is under the authority of a *datuk*. The third type of land belongs to the kinship group of a mother's lineage. Such land was originally customary or *bosa/kampuang* land granted by the *Nagari*, tribe or *bosa* leader to a matrilineal kinship group in the past. In Minangkabau literature, such land is called *tanah pusaka tinggi* (literally 'high-level heritage land'). The fourth type of land is privately owned through purchase or clearing. In Minangkabau literature, such land is called *tanah pusaka rendah* (literally 'low-level heritage land').

To the Kapa and the Sasak, the authority over customary land lies in the hands of the *pucuak adat* and the *datuk*, with the former

being the highest authority and decision-making body with regards to customary land. In the districts of Pasaman Barat and Pasaman, such a system is called *babingkah* or *banungkah tanah*.⁹ Normatively, there is a power balance in authority over customary land as the *pucuak adat* must not make a decision without the knowledge and agreement of the *datuk* or the tribe chiefs. In *Nagari* Sasak the authority over *tanah pusaka tinggi* lies in the hands of the *datuk* or the tribe chiefs. In both *Nagari*, *kampung*/tribe-based kinship groups also have authority over land, but only over land which, in local terminology, is called ‘inherited land’ or *Pusako Tinggi* (ie land given by the *pucuak adat* to the groups).

It is important to discuss the regulations upheld by the Kapa and the Sasak concerning access to customary land and *bosa*/tribe land. Basically, members of a kinship group are entitled to manage customary land. The members may manage customary land or *bosa* land upon permission from the *pucuak adat* (for customary land) and the *datuk* (for *bosa* land) or the tribe chiefs (for land controlled by tribes in *Nagari* Sasak). A community member can directly cultivate customary land or *bosa* land but must seek permission from the *pucuak adat* or the *datuk* or the tribe chiefs to obtain certainty of the right to cultivate that area. To be cultivated, such land must never have been cultivated by others. To seek permission from the relevant *ninik mamak* (the *pucuak adat* in case of customary land; the *datuk* in case of *bosa* land) a community member must pay a customary compensation called *adat disisi limbago dituang* to the *ninik mamak*. The compensation is based on the custom called *ka rimbo babungo kayu, ka lauik ba bungo karang* (literally, ‘to the forests one can find tree flowers; to the sea one can find coral flowers [sponge]’).

Land managed by members of a kinship group becomes the property of the cultivators and such land has the customary status of *pusako rendah* (low-level heritage). Customary/*bosa*/tribe land cultivated with the permission of the relevant *ninik mamak*

can become the property of the cultivators as they may sell the land with the permission of the relevant *ninik mamak*. Recently, a growing number of rights-holders over what was once customary/*bosa*/tribe land have sold the land to either members of other kinship groups or to outsiders. While such an act is not considered a violation of customary rules, the communities think that it has made the Kapa and the Sasak mere observers in the development of oil palm.

Different rules of land tenure and acquisition are imposed on outsiders. Outsiders may access customary/*bosa*/tribe land but cannot obtain proprietary rights to it, unlike members of a kinship group. The only right that can be granted to outsiders is the right to utilise land. The customary norm of the Kapa and the Sasak concerning the granting of rights to outsiders is *ibarat kubangan kabau, kabau pai kubangan tingga* (literally, ‘like a buffalo’s wallow; when the buffalo leaves, the wallow remains’). To obtain customary utilisation rights, outsiders have to pay compensation called *adat disisi limbago dituang* and *bunga kayu* to the relevant *ninik mamak*. In addition, if the land to be cultivated has formerly been managed by members of a kinship group, the outsider has to pay *siliah jariah* (‘compensation for the work done’) and has to pay for any plants of economic value growing on the land.

Unlike the Javanese, the Kapa and the Sasak have a collective and matrilineal heritage system. Customary land is owned collectively and is passed down from one generation to another as a collective property, by both men and women. The same applies to *bosa* land. Both classifications of land can be controlled by any member of a kinship group, both men and women. The inheritance system for land (both *pusaka tinggi* and *pusaka rendah*) is based on the mother’s lineage, which means that it is female children, rather than males, who are entitled to the inherited land. Although the Kapa and the Sasak are Muslim, they have not adopted Islamic inheritance laws, but continue to follow Minangkabau customs in this respect.

Process of land acquisition

The land used by PT PHP I is the customary land of both *Nagari* Kapa and *Nagari* Sasak. In 1997, in *Nagari* Kapa, the *ninik mamak* (the *pucuak adat* and the four inner *ninik mamak* and the four outer *ninik mamak*), with the full knowledge of the heads of all the villages in *Nagari* Kapa, handed over customary lands to the Regent of Pasaman, who further granted these areas to the oil palm investor, PT PHP. The handover was recorded in a land handover letter signed by the *ninik mamak* with full knowledge of the village heads.

The handover of the customary land to the Regent of Pasaman (and then to PT PHP) first took place in *Nagari* Sasak and then in *Nagari* Kapa. As detailed information was only gathered on the acquisition of *Nagari* Kapa's customary land, this section and the following ones will only describe the situation for this *Nagari*. In 1994, three years after oil palm was developed in *Nagari* Sasak, PT PHP contacted the *pucuak adat* of *Nagari* Kapa to discuss its interest in setting up oil palm estates and asked for lands in *Nagari* Kapa. The then Regent of Pasaman district (Taufik Marta) invited the *pucuak adat*, the head of KAN, and the *datuk* to meet him in Lubuk Sikaping. The invitees were intended to be the representatives of the *Nagari* Kapa community. Acting as the head of the representatives were the *pucuak adat*. The representation was not a result of a deliberation process but was based on the applicable customary authority structure. In the meeting, the Regent asked that the swamp lands in the *Nagari* be granted to PT PHP for oil palm development. He said that the oil palm estates would be divided into two kinds: nucleus (70%) and plasma (30%). The representatives of *Nagari* Kapa gave their consent to hand over the swamp area without first consulting with the Kapa community as rights holders of the customary land.

During the meeting, Mr. Bahar – the head of KAN – raised an objection to the ratio of the estates (70:30). He suggested a ratio of

50:50, to which the Regent objected. Despite the consent to hand over the customary land, the meeting did not reach an agreement on the ratio of the nucleus-plasma estates, and the handover was suspended.

Three years later, in 1997, the district government of Pasaman via the head of Pasaman sub-district contacted the *pucuak adat* of *Nagari* Kapa again to have a discussion on the relinquishment of the customary land. The meeting was held probably because PT PHP kept asking the Pasaman Regent for lands. The sub-district head invited the *pucuak adat* and the *ninik mamak* to a meeting. In the meeting the 50:50 ratio of the nucleus-plasma estates proposed in the previous meeting three years ago was approved. The agreement was then written in a land handover letter.¹⁰ As such, the *ninik mamak* of *Nagari* Kapa officially handed over the customary land to the Regent to be further granted to PT PHP. No consultations were held with the wider Kapa community prior to this decision. The land handover letter from the customary leader of *Nagari* Sasak to Pasaman Regent to be further granted to PT PHP contains the same ratio: 50% for nucleus estates and 50% for plasma estates.

Aninik mamak meeting was then held, which was attended by the *Nagari* representatives and the village heads, where the *pucuak adat* shared the results of the meeting with the Regent. The *ninik mamak* meeting seemed to have been held to disseminate information rather than to make a decision. In the meeting, some members of *Nagari* Kapa disagreed to the handover and protested against the agreement. However, the *pucuak adat* and the head of KAN took no notice of the protest, most probably because the agreement to relinquish customary lands had already been made. In a meeting in early 2012 attended by at least 10 community leaders of *orong Rantau Panjang* (a hamlet of *Nagari* Sasak) and the Tribe Chief, who held office when the agreement was made, the participants said that the community of *Rantau Panjang* was not consulted in the decision-making

process. In the words of the Tribe Chief, 'I did not know anything about the handover until the company started to cultivate the land.'

The district government of Pasaman and the company did not disseminate information on the decision about the handover. It appears that his information was only circulated among the *ninik mamak* who participated in the meetings with the government. All information was kept by the customary leaders and was unknown to the *Nagari* communities, who held the rights to the land.

Yet both the district government of Pasaman and PT PHP I acknowledge that the land converted into oil palm estates customarily belonged to the communities of *Nagari* Kapa and *Nagari* Sasak, as indicated by the fact that the company and the district government needed to seek permission from the *ninik mamak* to use the land. Such acknowledgement was also clear from the inclusion of the term 'customary land' in the handover letter. PT PHP I itself had paid the compensation as regulated by the customary law for the land handed over by the *ninik mamak*. As described above, the *ulayat* land of *Nagari* Kapa is owned collectively by the community. In the view of the Kapa community, there is no single piece of land in its territory without an owner – a claim based on the local values and customs that is constitutionally supported by Article 18B paragraph (2) of the 1945 Constitution of Indonesia.

However, in the development of PT PHP I's oil palm estates, the land was acquired without involving the entire *Nagari* Kapa community. Only customary leaders were invited and talked to by the district government and the company. A former member of the *ninik mamak* of *Nagari* Kapa, Pak Bahar, who had been involved in the meetings discussing PT PHP I's plan to set up oil palm estates, testifies that he, along with other customary leaders and the *ninik mamak* released over 1,600 ha of land on 6 February 1997 to the Regent of Pasaman

district (currently Pasaman Barat district), claiming they acted on behalf of all the owners of the *ulayat* land of Ke *Nagarian* Kapa.¹¹ The purpose of the land release was so that PT PHP I could develop oil palm plantations in *Nagari* Kapa.¹² Pak Bahar said that during the process of releasing the land, the customary leaders had held a village meeting with the wider community and that the community had agreed to accept and support the company's plan.¹³

However, field findings and documents obtained revealed that the decision of the customary leaders to the handover of the 1,600 ha of land was not made with full participation of the *Nagari* community, including the absence of women (*bundo kanduang*).¹⁴ This is substantiated by the presence of a clause in the letter signed by the customary leaders and the *ninik mamak* on 6 February 1997 stating that the undersigned would be held accountable should there be problems relating to the land in the future, including claims by other parties to the land. This raises questions about the extent to which the agreement to release customary lands was made only by the leaders or with the involvement of the entire community (*cucu kemenakan*).

During the land handover of 1997, the district government of Pasaman (now Pasaman Barat) and PT PHP simply trusted the statement of the customary leaders and the *ninik mamak*, and appear to have turned a blind eye to the possibility that many among the *Nagari* community (*anak kemenakan*) might disagree to the handover. As a result, conflicts over the lands continue to this day. Community members not involved in the agreement-reaching process have continued to stage protests over the last 15 years, demanding that their land be returned to them. Some protests have been made by Tunas Mekar, a farmer's group of *Nagari* Kapa members. The protests concern both the loss of land, which *Nagari* Kapa custom regards as reserved for children and grandchildren, and also the way in which the district government and the company obtained the land.

Considering the requirement on RSPO member companies to address ongoing conflicts over land, the community protests over the land acquired by PT PHP I clearly place a strong obligation on PT HPH to respond in good faith to the community concerns. The handover of the land by customary leaders to the district government for the use of PT PHI can be seen to represent only their own interests, while the interests of their *Nagari* community (*anak kemenakan*), who are rights holders over land and an integral part of the *Nagari*, were ignored. It is therefore understandable that the customary leaders are being accused by their members of receiving benefits (i.e. money) from the land acquisition process.¹⁵ This is also substantiated by the documents prepared by Tunas Mekar relating to demands for settlement of land conflicts in *Nagari* Kapa in 2006.¹⁶

The right of community members to give or withhold their consent was also not respected by the district government in the process of granting permits to PT PHP I, including Location Permits and HGU as well as in the development of AMDAL documents. The interviews with more than 10 community members from different settlements within *Nagari* Kapa reveal that in each of these processes, their opinions were not sought, and they were not party to decisions to release lands, even though customary laws require the whole community's involvement in processes concerning land allocation, as described in the previous sections.

Problems arising after the handover

Land conflict

After the *ninik mamak* gave up some of the community's *ulayat* land in 1999-2000, the *cucu kemenakan* (descendants) in Kapa attempted to work the remaining part of the *ulayat* land, which lies between PT PHP I's concession and Sidodadi village. About 150 households wished to work the remaining

part, which encompassed approximately 200 ha. However, the effort was prevented by BRIMOB (Mobile Police Brigade). It is not clear who reported the community's act to the Police. The expulsion of the local cultivators drove the community to vandalise the Police Office. The Police arrested several men suspected of leading or committing the vandalism. Several community members were arrested, tried and imprisoned.

The community reported the case to various government agencies in West Sumatra and Jakarta and took the case to court. The civil suit is currently being handled by the Supreme Court of the Republic of Indonesia. Despite the civil suit, the land in question is now controlled by wealthy individuals whose origin is unknown. It is reported that a police officer has control over a 40 ha piece of land although he is not one of the *anak kemenakan* of Kapa. The dispute between the *ninik mamak*, *cucu* and *budo kandung* who rejected the handover of the land and the *ninik mamak* who handed over the land was on-going at the time of the field study.

Plasma estates

The handover of plasma estates from the company to the communities in both *Nagari* was not carried out properly, and only took place due to community pressure. In 2000, the communities of Kapa and Sasak staged a protest, as the promised plasma estates had not been handed over by the company although the company was said to have planted all the estates and these had started to be productive. No information on when the handover of plasma estates would take place has been made available. The communities prevented the company from harvesting oil palms until their demand was met. In 2004, PT PHP I handed over 353 ha of plasma estates to *Nagari* Kapa. The communities of both *Nagari* however raised an objection to this as the plasma estates that were provided were smaller than what had been agreed (50% of the total estates).

The communities kept demanding that the company fulfill its promise. Five years later, the company handed over another 344 ha of plasma estates to *Nagari* Kapa.

According to PT PHP I and the head of KUD (village-level cooperative), all the plasma estates had been given back to the communities, but the communities of both *Nagari* were still unsatisfied with the size of the plasma estates. Some of the customary leaders in *Nagari* Kapa thought that the company had not fully fulfilled its promise. The plasma estates were smaller than promised because the company was thought to have set up larger estates than it had said it would. The community leaders demanded re-measurement of all the estates – both the nucleus and the plasma given to *Nagari* Kapa. In response, the company asserted that the re-measurement was not necessary as a participatory measurement process had been carried out in 2004. Despite the company's explanation, there is still dissatisfaction with the data on the size of the estates among the customary leaders in both *Nagari*. In addition, the community of *lorong* Rantau Panjang thought that the size of the plasma estates they received from the company (they could not tell the exact size, but the estates were said to be 40 to 46 hectares in size) was far below what they had expected. According to them, PT PHP I had not fully fulfilled its promise. Despite their dissatisfaction, they did not express their aspirations to the company. A discussion between the authors and the company revealed that the company had never received any formal complaint from the community of *lorong* Rantau Panjang.

There were other problems with the plasma estates. First, they were not handed over to individuals but to groups, who then became the owners of the estates. The head of the District Estate Crops Office of Pasaman Barat confirmed that such group-owned estates could not be said to be the plasma estates as regulated in government regulations. Second, the handover of the estates to groups caused problems among the group members, who were dissatisfied

with the group leader's transparency regarding the price of FFBs paid by the KUD. PT PHP I asserted that the problems arising within the groups (called plasma groups) were not their responsibility. The company said that it was the responsibility of the *ninik mamak* of *Nagari* Kapa and *Nagari* Sasak to settle plasma-related problems. Community members believe that because the company had promised to set up plasma estates for the communities of Kapa and Sasak, it should also assume responsibility for plasma-related problems.

After the handover, a new problem arose. Not all of the community members gained benefits from the plasma while there were others who were not members of the Kapa community who obtained plasma, thereby benefiting from the *ulayat* land meant for the welfare of the children and grandchildren. In an interview with the Plasma Cooperative of Kapa, the chairman of the cooperative said that non-Kapa people gained benefits from the plasma because the Kapa communities sold the produce to them. There were also some community members who gained no benefits at all from the plasma although they had been living in Kapa for a long time. To date the communities do not know with certainty the exact size of the *ulayat* land managed by PT PHP I. Bahar, a member of the *ninik mamak* who handed over the land to the company, says that he once asked PT PHP I to re-measure the land to find out the exact size. However, the company is yet to conduct the re-measurement.

PT PHP I's unilateral determination of who would represent the communities

As described above, the communities of Kapa and Sasak have their own customary institutions and governance, namely KAN, the *pucuak adat* and the *Nagari* government. Despite these institutions, community members we interviewed claimed that PT PHP I unilaterally appointed the KUD management to represent the communities, by referring to government regulations only. The KUD and its management is not



■ Pak Bahar being interviewed by the research team

the institution chosen by the communities to deal with outsiders according to customary practices. PT PHP I argues that the *ninik mamak* was part of KUD and hence they determined that the KUD was representative of the communities in accordance with local tradition. This is regarded by community members as incorrect as the *ninik mamak* in KUD served as members only, not as representatives or leaders of the community. If the KUD management had been appointed as the representative of the communities, the appointment should have been agreed to by the communities.

Another indication of unfair practices in land acquisition was the effort made to get rid of traditional leaders who refused to hand over customary lands to the government. Not all the members of the *indwak* and the *ninik mamak* agreed to hand over the land to the government – some refused. According to these individuals, the handover was in direct contradiction to Kapa customs, as the land was meant for the *cucu kemenakan*, for their future. Those refusing to hand over lands also

refused to receive the *siliah jariah* money. As a result, they were ostracised. One way to get rid of the members of the *ninik mamak* was by suddenly replacing them with new members. At that time, *dato* Mansurdin, who was elected by his people, was suddenly replaced without any consent from his community and without appointment by the community *ninik mamak*. His replacement was one of his relatives who by custom ‘just stays’ with *dato* Mansurdin’s people. This relative then claimed the title of *dato* Rangkayo Mudo. It was he who later, with the other *dato*, agreed to hand over the land to the government.

Distortion of the meaning of ‘*siliah jariah*’ compensation

According to Kapa custom, *siliah jariah* is a form of bunga pohon dari hutan (literally ‘flowers from the trees of the forest’), a form of tax paid for using customary land. Colchester et al (2006) note that *siliah jariah* is compensation paid for the energy and ideas devoted by a land owner in managing a piece of land. *Siliah jariah* does not transfer the right to own land, but the right to manage

land. If one wants to have full management rights over a plot of land, one must first be adopted by the relevant indigenous community and respect and follow their customs.¹⁷

PT PHP I, however, interpreted *siliah jariah* as money given to communities when they relinquish their customary rights, or the right to their *ulayat* land. Companies frequently use this term to smooth the way for land sales and purchases from customary communities. This can be inferred from statements by the management of PT PHP I about *siliah jariah* when they were interviewed by the researchers on 28th June 2012. One staff member states:

When the company first came to the area, there was a customary compensation called *siliah jariah*. *Siliah jariah* means the relinquishment of a customary right, which means that the right to *ulayat* land is relinquished.

It is probable that Kapa community members received money from PT PHP I through their *ninik mamak* because the company said it was *siliah jariah*, a tax paid by the company for using their land. Bu Mas states that after receiving the compensation money, many of the communities agreed to hand over their land to the company. Bu Mas adds:

After the communities received *uang bunga kayu*, called *siliah jariah* here, many of them agreed to hand over the land. But it seems that they did not know at that time what the money meant; they did not seem to know why somebody gave them the money.

What has the government done to help or require companies to respect international instruments and voluntary standards?

Judging from the opinions and views of the district government officials interviewed, no room has been available for the consideration or adoption of international instruments in relation to the right to FPIC, human rights and/or voluntary standards. In

the interview, government representatives stated that the only applicable standard was existing national laws. They claimed to respect customary land laws (such as those on *ulayat* land) but said that the only applicable laws were the formal ones, namely, State law. Nearly all customary laws observed by indigenous people are unwritten ones.

Assistant I and the Head of the Agrarian Agency of the District Government of Pasaman Barat stated that the district government does not have regulations, policies or Standard Operational Procedures concerning agrarian affairs and the settlement of agrarian conflicts. The district is new, the result of a split from the district of Pasaman in 2003. The number of land conflicts in Pasaman Barat is high and this is why the Agrarian Agency, which was previously under Governance Affairs, is now an independent agency, namely the Agrarian Affairs Department.

The district government officials were aware that the release of *ulayat* land by the *ninik mamak* was not carried out with the consent of all the *ninik mamak*, *cucu kemenakan*, and *budo kandung*. According to the officials, however, the handover was legitimate as there was a written statement of the handover. They state that the land was released by the *ninik mamak* to the government, and the government granted it to investors. The officials believe that the *ninik mamak* and the Kapa community no longer have the right to the customary lands that were released.

The government officials admitted that the Kapa are an indigenous people as indicated by the observance of local customs and values, customary structures and customary land ownership. According to the customs prevailing in Kapa, prior to the release of lands a customary meeting must be held so that the views of all the groups in the community can be heard. However, the land had simply been given up by some, not all, of the *ninik mamak* despite the fact that the Kapa observe *babingka adat*, according to

Perspectives of an *indwak*, a women's leader in Kapa



■ Bu Mas with researcher, Fatilda Hasibuan

Bu Mas, one of the *indwak* or women's leaders of Nagari Kapa, believes that the land now managed by PT PHP still belongs to the Kapa people. According to her, the land was leased to the company for a 25-year period by the *ninik mamak* of Kapa. After 25 years, it will return to the Kapa people because it is their customary land. As one of the women's leaders in her community, she is certain that the land has not been sold because customary land cannot be sold.

How can the customary land be sold? It is for our *cucu kemenakan*; it cannot be sold. If the land is handed over to someone else, how can our *cucu kemenakan* make a living?

Her conviction differs from statements by the district government of West Pasaman via the First Assistant, who states that the customary land of Kapa has been handed over to the district government by the *ninik mamak* of Kapa. The agreement was made in ink. The district government then provided these lands to investors. The company has turned the land into plasma and nucleus (*inti*) oil palm estates. For the part used as plasma, based on the Regent's Decree, the ownership certificate will be granted; on the other part, a business

use permit (HGU) has been issued. The part encumbered by HGU is now classified as State land. When the permit expires, the land shall be returned to the State. In the words of the First Assistant:

The land that the *ninik mamak* handed over is now encumbered by HGU. It is no longer *ulayat* land.

According to the staff of PT PHP II, the company is likely to extend its HGU, and when the HGU expires, it will abide by the prevailing rules, that is to say, returning the land to the State as they agree that it belongs to the State.

In the letter handing over land from the *ninik mamak* of Kapa to the district government of Pasaman, there are no clauses concerning the return of the land to the community. According to Bahar, one of the *ninik mamak* who handed over the land to the government, if the 25-year period of rent is over, the land will be returned to his community although this is not regulated in the land release letter. However, he notes that in a meeting with the district government of West Pasaman held in mid-2011, the Law Bureau of the West Pasaman District Government stated that the returning of the land to the customary community was not the government's final decision.

As an *indwak* in Kapa, Bu Mas said that she did not intend to extend the contract with the company. For her, it is time that the land is returned to the Kapa people because the number of grandchildren keeps growing and they all need to make a living.

If the contract is over, I don't want it to be extended. The land must be returned to the owners - my Kapa community and our grandchildren. If the government or the company refuses to return the land to us, we shall fight for it.

which *ulayat* land belongs to all the groups or *cucu kemenakan*; the *ninik mamak* only serve as the protectors of the land, or Manjago Sako Jopusako. *Ulayat* land is customarily reserved for *cucu kemenakan*, and it cannot be sold or transferred. When a person asks for a piece of land, custom says that the person should become part of the *anak kemenakan* in Kapa, for which a customary ceremony must be held (*menguningkan nasi*, literally ‘making yellow rice’ and saying a prayer). *Menguningkan nasi* is one of the most sacred ceremonies in Kapa as it is held to call the ancestors’ spirits. However, the ceremony had not been held during the release of land for the use PT PHP I. However, from the officials’ point of view, it is clear that customary laws will not be taken into consideration if the government wishes to settle the conflict between the Kapa community and the company.

All the officials interviewed are aware of the conflict between *Nagari* Kapa-Sasak and PT PHP I. According to Assistant I, Pasaman Barat is seeking a means to settle conflicts, both land-related and plasma-related, between the company and the communities. He stated that the RSPO standard will be used to help develop the district government’s concept. In 2012, the Regent of Pasaman Barat recently ordered that all company licenses granted in Pasaman Barat be reviewed.

Around 2004, the district government formed an agrarian-related conflict settlement team, whose members are made up of various elements such as the District Government, the Estate Crops Office, the District Police, and community leaders. Assistant I, the head of the Estate Crops Office, and the National Land Agency are members of the Conflict Resolution Team of Pasaman Barat. However, they stated that they are only the facilitators and mediators, bringing the conflicting parties to meet, to find out what the problem is, and to ask each party what their demands are. If the parties can reach an agreement, the problem is resolved. If they do not, the case may be brought to court, as these officials cannot make a decision on these disputes.

Similarly, no response has been given by the government to the request for re-measurement of both the nucleus and plasma estates as proposed by Bahar and other members of the *ninik mamak*. The total land released encompassed 1,600 ha while the plasma given by the company totals 670 ha. To obtain the remaining plasma estates, Bahar has verbally requested the National Land Agency to re-measure the land. Bahar estimates that the nucleus estates cover over 800 ha. According to the head of the District Estate Crops of Pasaman Barat, the re-measurement proposal is a good one, as it could clear things up, but he was concerned that the land area may turn out to be smaller than it should be. The land was in fact not measured when it was handed over. If the nucleus estates are larger, the excess can be given to the community, but what about if they are smaller? No response has been given by the government to the request by the community to date.

When asked what would become of the *ulayat* lands when the HGU expired, the head of the Estate Crops states:

The land release letter states that the land will be returned to the State, not to the community, because the land has been handed over by the *ninik mamak* to the government, and then the government granted it to the company. It’s all done.

The head of the District Agrarian Agency adds:

To date, no national regulations stipulate that after an HGU expires the land previously encumbered by the permit will be returned to indigenous communities. The *ninik mamak* has given up their right over the land to the State so they no longer have the right. They have signed the relinquishment letter.

The officials’ views do not offer room for the application of customary laws despite the fact that in West Sumatra most inhabitants still observe customary values and laws and still recognise customary ownership and customary institutions. In addition to protection by the 1945 Constitution, several

National and Provincial laws do recognise customary laws. For example Law No. 39 of 1999 on Human Rights, Article 67:

Anyone living in the state territory of the Republic of Indonesia is obliged to obey the legislation, unwritten laws and international laws on human rights, which have been accepted by the Republic of Indonesia.

One of the basic human rights relating to indigenous peoples and their rights is regulated in Article 6 paragraph (1):

In order to uphold human rights, differences within and the needs of customary law communities must be taken care of and protected by the law, communities and the government.

Paragraph (2) further stipulates:

The cultural identity of customary law communities, including the right to *ulayat* land, is protected, in line with the advancement of civilisation.

Law No. 32 of 2004 on Regional Government also provides room for provincial governments to regulate and take care of the interests of local communities based on their own initiatives and aspirations, within the general framework of laws in the Republic of Indonesia. In line with that law, the provincial government of West Sumatra issued two provincial laws, namely the Provincial Regulation of West Sumatra No. 2 of 2007 on Fundamentals of *Nagari* Governance and the Provincial Regulation of West Sumatra No. 16 of 2008 on *Ulayat* Land and Its Utilisation. When asked their opinion on Article 3 paragraph (3) of Provincial Regulation No. 16 of 2008, which stipulates that:

In the event that *ulayat* land is no longer utilised by the manager, be it a legal entity and or individual, the land shall be returned to the customary owner while considering the civil rights of the person concerned that are related to the *ulayat* land

the officials stated that the regulation may not be applicable as one needs to look at the

higher laws or the laws regulating business use permit (HGU) instead/first. Yet Article 4 of the Regulation clearly stipulates that:

The purpose of the regulations on *ulayat* land and its utilisation is to protect *ulayat* land in accordance with the Minangkabau customary laws and to enjoy the benefits from land, including natural resources, for the survival of customary law communities and the continuity of their lives from one generation to another and uninterruptedly across customary law communities and their territories.

However, judging from the officials' responses to the researchers' questions, it is most unlikely that the District Government of Pasaman Barat will adopt regulations concerning respect for *ulayat* land or require plantation companies to respect the right of communities to FPIC, or to follow voluntary standards requiring the resolution of the conflict between PT PHP I and the Kapa community.

Recommendations

Recommendations to the company

- To demonstrate to the affected communities, the government and the wider society that the company has the legal right to establish and manage plantations on the lands of *Nagari* Kapa by providing all documents related to the significant legal shortcomings identified in this study.
- To establish a mechanism to receive and resolve conflicts with the *Nagari* Kapa community, and not rely on the community smallholder cooperative alone to play this role.
- To engage with all sections of the Kapa community and respect the wishes of the community as to who from the community liaises with the company, and what consultation and decision-making processes within the community need to take place for a decision concerning land use to be valid.
- To inform the community, the government and the wider society

about its obligations as an RSPO member to respect the rights of the Kapa community, including the right of the community to give or withhold its consent to the release of lands for the use of the company.

- To inform the community, the government and wider society of how it intends to respect the customary rights of the Kapa community and to set out a timeline and action plan for establishing a mutually agreed mechanism for resolving existing conflicts.
- To actively support the community to regain its rights over the *ulayat* lands that were released to the government and then to the company, as the community considers that their lands were only leased to the company, and not sold.
- To offer to assist the affected community with participatory mapping of customary lands and concession/HGU boundaries in order to clarify who is entitled to compensation for leased land, and if any additional plasma areas need to be transferred to the community.
- To provide information pertaining to the company's operations to all community members in an adequate, sufficient and timely manner.

Recommendations to the District Government

- To undertake a review of the legal basis of the operations of PT PHP I in Pasaman Barat, in particular examining the legal shortcomings identified in this study.
- To develop a District law, based on the Provincial law on *Nagari*, with the aim of securing the rights of customary communities to their *ulayat* land and recognising their institutions and customary systems of government.
- To create a mechanism for communities to lease their lands to oil palm companies or other developers in a way that ensures that their rights under both national and international laws, as well as any applicable voluntary standards, are recognised and respected.

- To grant public access to the legal documents relating to the licensing and control of land by PT PHP I to ensure public disclosure.
- To conduct monitoring of legal violations identified in this study, enforce any regulations or laws that have been broken and withdraw any permits found to be invalid.

References

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Letter of the State Minister of Investment/the Head of BKPM No49/V/PMA/1999 dated 19th April 1999 on Approval for Change of the Company's Status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA).

Attachment of the Decree of the State Minister of Investment/the Head of BKPM No. 49/V/PMA/1999 dated 19th April 1999 on Approval for Change of the Company's Status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA).

Endnotes

1. The company was originally named PHP and then expanded to create PHP II with the original area and company being renamed PHP I.
2. SK HGU (Inti) PHP 1 No.65/HGU/BPN/2004.
3. This information is taken from the Letter of the State Minister of Investment/the Head of BKPM No49/V/PMA/1999 dated 19th April 1999 on Approval for Change of the Company's Status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA).
4. *Nagari* is a Minangkabau word meaning village.
5. The information is taken from the Attachment of

- the Decree of the State Minister of Investment/ the Head of BKPM No. 49/V/PMA/1999 dated 19 April 1999 on Approval for Change of the Company's Status from Domestic Investment Enterprise (PMDN) to Foreign Investment Enterprise (PMA).
6. There is another *Nagari* in Luhak Nan Dua, *Nagari* Koto Baru, while Sasak Ranah Pesisir consists of one *Nagari* only. Luhak Nan Dua seceded from Pasaman sub-district and Pasaman Barat seceded from Pasaman district in 2002. The lands of both *Nagari* Kapa and *Nagari* Sasak were acquired by the government and were then granted to PT PHP I when both *Nagari* were still part of Pasaman district.
 7. Badan Pusat Statistik 2010.
 8. The information is taken from the attachments of PT PHP's UKP/UPL document, endorsed by the Regent of Pasaman in 2004.
 9. In the districts of Pasaman Barat and Pasaman, there are two kinds of authority over customary or *ulayat* land. The first one is *babingkah* or *babungkah adat (kepingan adat)*, where the leader of a kinship group has the highest decision making authority over communal land affairs. The second is *babingkah* or *babungkah tanah (kepingan tanah)*, where the *pucuk adat* is the highest decision-making body in communal land affairs. The models differ concerning what is called communal land. In *Nagari* that adopt the *babingkah tanah* model, there is customary land that is owned collectively. In *Nagari* adopting the *babingkah adat* model, there is no customary land but tribe and clan land, such as in *Nagari* Kinali.
 10. The researchers have seen the letter and can confirm it states that 50% of the land would be for nucleus estates and the other half for plasma estates, which would be handed over to the Kapa community.
 11. As per document signed by the *Ninik mamak*/ customary leaders stating the handover of 1,600 ha of land to the District Government of Pasaman for oil palm development by PT PHP.
 12. As per agreement document signed on 6th February 1997 by the *ninik mamak*/customary leaders, holders of the *ulayat* land of North and South Kapa in *Nagari* Kapa, Pasaman Subdistrict, Pasaman district.
 13. Ibid.
 14. Bundo Kanduang is the personification of the Minangkabau tribe as well as a term used to refer to a woman leading a family in Minangkabau culture.
 15. Interview with a member of *Tunas Mekar*' (farmer's group), Mr. Z, 26th June 2012.
 16. A document entitled the National Agenda Plan for the Settlement of the Conflicts over the Kapa's *ulayat* Land in Pasaman Barat district mentions how the customary leaders of *Nagari* Kapa misused their authority to sell, transfer or hand over right to land to outsiders without the community's knowledge.
 17. Colchester et al 2006:132.