

Palm Oil Land Litigations in Indonesia: Cases Involving Malaysian MNE Sime Darby Plantation Berhad

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Abstract— Malaysia currently accounts for 39% of world palm oil production and 44% of world exports. Being one of the biggest producers of palm oil, Malaysia has an important role to play in fulfilling the global demand for palm oil. With the growing global demand for palm oil, Malaysian Multinational Enterprises (MNEs) have embarked on the expansion of palm oil plantations by venturing into cross border palm oil plantation ventures including Indonesia. Nonetheless, the cross border venture may not an easy project, as the MNEs have encountered unprecedented challenges. Currently, land conflict in palm oil plantation ventures in Indonesia is one of the main impediments for Malaysian MNEs implementing investment in Indonesia. This issue if not resolved can lead to the failure of the MNEs' investment and may affect FDI flows into Indonesia. The main objective of this paper is to examine the case law litigation and related information elicited from qualitative sources and interviews with relevant persons involving land issues in carrying out palm oil plantation ventures in Indonesia by Sime Darby Plantation Berhad ('SDPB')(being a subsidiary of Sime Darby Berhad). Qualitative social and legal research methodologies were used in this writing. From this writing, certain information can be generated to illustrate the problems and their causes arising from land conflict in palm oil plantation ventures in Indonesia and the approaches that have been undertaken by the investors to deal with the problems. The findings of the writing will add knowledge to relevant persons in understanding the dynamic challenges that are faced by Malaysian MNEs in its internationalization of palm oil plantation ventures.

Keywords— Cross Border Palm Oil Plantation Ventures; Palm Oil Land Litigation; Indonesia, Sime Darby Plantation Berhad ('SDPB'); Approaches.

1. Introduction

Palm oil is the fastest growing vegetable oil with currently Malaysia and Indonesia in leading league of the producer and exporter of that commodity. The upsurge in demand of

oil palm as against other types of vegetables oil is largely due to the comparative price advantage of that commodity. It is relatively cheaper and healthier when compared to other type of cooking oil especially in their generic class of other vegetable oil. Besides that, the palm oil has its own advantage in the form of the upstream and downstream segments wherein its versatility and industrial usability spans from the edible and also to no edible product like for example biofuel [8],[6].

The early palm oil plantations were mostly established and operated by the British planters. Guthrie was the first British owned company to actively engaged in the commercial planting of palm oil in 1924 under a newly formed company called Elaeis. It was a pioneering British company in Malaya then engaging in that commercial cash crop plantations. Then it was followed by others British owned company, Harrisons & Crosfield's estate in Sungai Samak in order to overcome their which was land unsuitable for rubber. On 1 July 1956 the local indigenous, the Federal Land Development Authority (FELDA) was formed when the Land Development Ordinance came into force with the main aim for eradicating poverty among the rural poor and landless. Until 2014, there were 112,635 FELDA settlers in Malaysia. In 1964, Sime Darby joined the fray by venturing into the new palm oil ventures in the Merlimau Pegoh and Talu Ayer estates [33].

During 1960s, the crops of oil palm have been diversified by the increased of the cultivation pace of oil palm [12]. Through the government's agricultural diversification programme, it promotes the planting of the palm oil as a means to reduce dependency of the country's economy on natural rubber and tin. This government's programme also included FELDA where large tracts of land were planted with palm oil. FELDA started its palm oil cultivation on 375 hectares of land in such scheme in 1961 [13]. In 1966, Malaysia overtook Nigeria as the world's leading exporter of palm oil [13]. During this time, palm oil plantation in Malaysia are largely based on the estate management system and smallholder schemes and land settlement

schemes for planting palm oil were introduced as a means to eradicate poverty for landless farmers and smallholders [12].

On the other hand, in 1970s until 1980s, the Malaysian palm oil industry showed the period of industrialization and origin refining. In 1970s, it is the period of the expansion of domestic refining and fractionation facilities then transformed Malaysia from Crude Palm Oil (CPO) exporter into producer and exporter of refined products through innovative taxation and incentive policies [12]. The palm oil industry expanded further with the large scale planting in Sabah and Sarawak [16]. Otherwise, in 1980s, showed that the “*Malaysianisation*” of three major plantation companies which are Sime Darby, Guthrie and Harrison & Cross field and also show the founding of the Kuala Lumpur Commodity Exchange (KLCE) as a key instrument for price setting, hedging and dissemination of market information to reduce market risk in the trading of palm oil [13].

Today due to the market expansion and product diversification, Malaysia and Indonesia are the top palm oil producers. This happened due to the existence of world’s largest listed plantation company via the Synergy Drive merger of Guthrie, Golden Hope Plantation and Sime Darby was completed in 2007. China, India and EU become the key consumers of palm oil [12].

This writing provides a background of palm oil investment in Indonesia by Malaysian investors. It explains the background of the study, the research objectives and how the research is organized.

2. Methodology

The authors used qualitative research methodology. The sources are primarily from the available literature and through interviews with relevant respondent data sources. Qualitative research methodology is used as the authors intend to do an in depth research over selected and accessible data relating to up-stream palm oil plantation ventures in Indonesia. This involves land issues. The reason as to why qualitative research is chosen rather than quantitative research methodology is because this type of research (qualitative) will allow more access to details, due to convenience, geographic proximity, getting more intensive analysis and in-depth study about the facts, problems, issues, legal phenomena and legal issues in the cross border palm oil plantation ventures in Indonesia [20]. The writing being qualitative in nature, it concerns exploring people’s life histories or everyday behaviour which quantitative writing is unable to grasp. Qualitative writing involves these features – soft, flexible, subjective, political, case study, speculative and grounded. In contrast, quantitative writing involves hard, fixed, objective, value-

free, survey, hypothesis testing and abstract. It limits the information that certain sources can offer. By using the qualitative method, information collected will be more and enriching as it involves an in depth study of certain particular phenomenon.

In qualitative writing, the data are often derived from one or two cases it is unlikely that these cases have been selected on a random basis. Very often a few cases will be chosen simply because of their accessibility. The reason why qualitative writing involves one or two samples under this study is because one of its philosophies is to avoid unfocused and exorbitant data so as to preclude the kind of intensive analysis. The approach and sample selection of this writing too is in line with the concept and belief under the qualitative research-where it employs purposive and not random, sampling methods. The phenomena that have occurred in the cross border palm oil plantation ventures in Jambi, Sumatera, Indonesia, where the field work research was done, may not be uncommon with other palm oil plantation global ventures elsewhere in Indonesia and other parts of the world. In other words, this research is designed to provide a close-up, detailed or meticulous view of particular cross border palm oil plantation ventures that have occurred which are relevant to or appear within the wider similar phenomena that have been experienced by a Malaysian MNE such as FGV Global Ventures Holdings Berhad, SDPB and TH Plantation Berhad which carry out palm oil plantation ventures in Indonesia [20].

2.1. Research Questions

- a. Why do palm oil land conflicts happen in Indonesia?
- b. How to deal with the conflicts?
- c. What are the approaches and policies undertaken and learned from the experiences of SDPB in palm oil land litigations in Indonesia?

2.2. Research Objectives

The objectives of this writing are:

- a. To illustrate palm oil land litigation cases involving SDPB in Indonesia;
- b. To analyse the issues that arise from the cases; and,
- c. To recommend approaches in dealing with palm oil land conflict in Indonesia.

3. Results and Discussion

Palm oil plantations and processing have become a strategic primary commodity industry for countries such as Malaysia and Indonesia and some countries in Southeast Asia. This has created the need for large scale land plantation ventures are carried out purely for commercialization purpose in order to cope with the global

demand for palm oil. For Malaysian Multinational Enterprises (MNEs) involved in cross border palm oil plantation ventures they do face with challenges and problems in the course of their cross border investment and operations. These problems are diverse and mostly caused by the absence of legal framework between the host government and the foreign investors. The authors have identified the following problems in this respect, *viz*:

- a. Unwelcome foreign intrusion into the domestic economy;
- b. Inequality bargaining power in terms of opportunities created by large-scale land acquisition; and,
- c. Culture of political patronage in cross border palm oil venture.

3.1. Unwelcome foreign intrusion into the domestic economy

The unwelcome foreign intrusion into the country's agricultural sectors have no two pronged approaches to help ease the threats relating to foreign direct investment in the agriculture land. There is no doubt that foreign investment can provide key resources for agriculture, including development for needed infrastructure and expansion of livelihood options for local people. However, if large-scale land acquisitions cause land expropriation or unsustainable use, then foreign investment in agricultural land can become politically unacceptable. Due to the absence of the two pronged approaches to help to address these threats posed by FDI in agricultural land, the authors are of the opinion that this writing is indeed timely and an opportunity to address these threats by way of developing a legal guide model for cross border palm oil plantation ventures between the host government and foreign investors. These threats need to be controlled and contained through a code of conduct mean for both the host governments and foreign investors by incorporating in the land agreements term such as transparency in negotiation, respect for existing right, sharing of profits, environmental sustainability and adherence to national trade policies [9]. For example, in order to procure the permit of plantation, the foreign investor who intends to invest in Indonesia must comply with their law on environment since it is their policy to ensure its environment sustainability. Law No. 23/1997 on environmental management requires any business enterprise to take full account of the environmental implications of its business operations. As a pre-requisite obtaining the plantation permit, the investors must have approved documents, comprising Environmental Impact Assessment (EIA) and Environmental Management and Monitoring Plans. Government Regulations No. 27/1999 on Environmental Impact Assessment further determines the criteria for

significant environmental impacts. The environment issues that must be in the table such as air pollution, soil erosion, social aspect such as labour, income, land tenure, customary rights and people perception of the proposed projects are the fundamentals that must be strictly adhered in so far as that legal proclamation requires. This apart from that, the code of conduct should also address related to land fraud, corruption, security and safety of the Malaysian MNEs in a cross border palm oil plantation ventures in Indonesia [3].

3.2. Inequality bargaining power in terms of opportunities created by large-scale land acquisition

Inequality in bargaining power in terms of opportunities created by large-scale land acquisition. This second problem statement is closely related to the first one. The argument presented here is that given the changing global economic context, the agricultural sector requires more investment. Because of the urgent need for greater development in rural areas and the fiscal inability of the government of developing-country to infusion of capital, large-scale land acquisitions can be seen as an opportunity for increased investment in agriculture. However, in antecedent to note that land acquisitions also pose threats to the people's livelihoods and ecological sustainability. For example, even though some of the land-lease agreements make provisions for investment in rural development, these deals may not be made on equal terms between the investors and local communities. The bargaining power in negotiating these agreements is on the side of the foreign firms, especially when its aspirations are supported by the host state or local elites. Effectively negotiate terms should have in mind the local people interest when dealing with such powerful national and international market players, a quid pro quo needs to be enforced on the agreement with the underlying interest of the local inhabitants. In view as for example, the foreign investors fail to provide the promised jobs or local facilities were displaced. As the result, unequal power relations in the land acquisition deals can put the livelihood of the poor and vulnerable at the deplorable risks [3].

3.3. Culture of Political Patronage in Cross Border Palm Oil Venture

In addressing the above problem statement, it is of paramount importance to note and take cognizant that in the context of this writing that several MNEs carrying out palm oil ventures are important investors with connection tentacles with Indonesian authorities [18]. According to [7] has rightly put it in her recent study that the regionalization of the oil palm plantation sector has shaped a political culture characterized by a deep-rooted patronage system.

Due to this similar shared culture of patronage in politics, Malaysia and Singapore were successful in positioning themselves into the existing patronage networks in Indonesia. This kind of practice can be seen from setting up subsidiaries, procuring licences to production and property rights to plantation lands, to appointing influential Indonesian figures to sit on the board. By doing so, Malaysian and Singapore MNEs have further entrenched the patronage politics within the palm oil industry. Strong connections with leaders at the top can help lubricate and smoothen all kinds of transactions. Take for instance in 1999 the Indonesian government enacted legislation for the control on proportions of peat lands used for palm oil plantations and the ban on the slash-and-burn farming. Peat lands are suitable for palm oil yet also extremely prone to fire. But, because of the culture of patronage politics often such legislation is only a “paper tiger as it lacks enforcement clouts since not many bothers about it and infraction are rampant. There is no doubt that some state agencies like Indonesians Anti-Corruption Commission, work closely with a local NGO, Indonesian Corruption Watch and are investigating a number of cases involving foreign companies and illegal land clearing. But their efforts are stonewalled by the Indonesian courts [18]. Instead of acting in defence of good governance, courts choose to protect powerful in the industry in which they have vested interest. For example, in 2010, an unnamed Malaysian-owned plantation was brought to court, but the case was from continuing to a higher court. Perhaps in the context of this writing, the authors opine the need to develop a comprehensive and adequate legal guide model for cross border palm oil plantation ventures, which will benefit Malaysian MNEs as well as the other stakeholders which ranges from the host government, the local communities and others in dealing with this malaise and problems.

3.4. Sime Darby Berhad (‘SDB’)

The giant in the Malaysia palm oil industry is also one of the largest conglomerates in the country is a MYR 65.0 billion (USD 15.96 billion) company that has multiple business segments. It is also one of the largest palm oil companies in the world in terms of plantation size. The conglomerate has business interests in industrial products, motor vehicles, properties, healthcare, logistics, insurance, retail, and plantations [22].

Its plantation segment is diversified across four regions; Malaysia, Indonesia, Liberia, and Papua New Guinea & Solomon Islands. Overall, it owns about 1.0 million hectares of plantation land. Moreover, it is not just in the upstream plantation business, it has a sizeable downstream business producing oils and fats, oleochemicals, biodiesel and other products [20].

In 2016, the company generated a revenue of MYR 43.96 billion (USD 10.79 billion) and a net profit of MYR 2.4 billion (USD 589,519,030.17). The company is currently trading at 21.0 times earnings, giving a 2.8% dividend yield. It has a market capitalization of MYR 62.7 billion (USD15.4 billion) [22].

3.5. The Palm Oil Land Litigation Cases

Based on the authors’ scrutiny, the litigation cases as mentioned by Dato’ Azmi Mohd Ali above, that involved Sime Darby Plantation Bhd operating in Indonesia and Papua New Guinea (PNG) are recorded in the Sime Darby Annual Reports. These cases are:

- a. Legal action against PT Anzawara Satria.
- b. New Britain Palm Oil Limited (“NBPOL”) v. Masile Incorporated Land Group (“Masile”), NBPOL v. Rikau Incorporated Land Group (“Rikau”) & NBPOL v. Meloks Incorporated Land Group (“Meloks”).
- c. Legal Action against PT Adhiyasa Saranamas (PTAS).

3.5.1. Legal action against PT Anzawara Satria [31],[30]

On 11 May 2006, PT Sajang Heulang (PT SHE), a subsidiary of Sime Darby Bhd filed a legal action in the District Court of Kotabaru against PT Anzawara Satria (PT AS) claiming for the surrender of approximately 60 hectares of land forming part of ‘Hak Guna Usaha’ (HGU) – Cultivation Right, 35 belonging to PT SHE on which PT AS had allegedly carried out illegal coal mining activities.

On 5 March 2006, the District Court of Kotabaru ruled in favour of PT AS and declared that HGU 35 was defective and had no force of law and that PT AS had the right to conduct mining activities on the said land (District Court Kotabaru Decision). PT SHE appealed to the High Court of Kalimantan Selatan at Banjarmasin against the District Court Kotabaru Decision.

On 4 December 2007, the High Court of Kalimantan Selatan at Banjarmasin upheld the District Court Kotabaru Decision (1st High Court Decision).

On 12 February 2008, PT SHE appealed to the Supreme Court of Indonesia against the 1st High Court Decision. On 10 March 2011, the Supreme Court ruled in favour of PT AS and ordered PT SHE to surrender 2,000 hectares of land in Desa Bunati to PT AS (1st Judicial Review Decision).

Meanwhile, on 24 May 2006, PT AS claimed in the State Administration Court Banjarmasin, Kalimantan for an order that the mining rights held by PT AS superseded the HGU 35 held by PT SHE and that the said HGU 35

measuring approximately 2,128 hectares was improperly issued to PT SHE. On 26 September 2006, the State Administration Court Banjarmasin ruled in favour of PT SHE and dismissed PT AS's claim (State Administration Court Banjarmasin Decision). PT AS appealed to the High Court of State Administration at Jakarta against the State Administration Court Banjarmasin Decision.

On 19 February 2007, the High Court of State Administration at Jakarta ruled in favour of PT AS and nullified PT SHE's HGU 35 (2nd High Court Decision). On 9 December 2009, PT SHE appealed to the Supreme Court against the 2nd High Court Decision. On 26 October 2010, the Supreme Court declared PT SHE as the lawful owner of HGU 35 (2nd Judicial Review Decision).

On 7 November 2011, PT SHE filed judicial review proceedings (3rd Judicial Review) before the Supreme Court seeking a decision on the conflicting decisions comprised by the 1st and the 2nd Judicial Review Decisions. On 28 December 2012, the Supreme Court dismissed the 3rd Judicial Review on the ground that the application could not be determined by another judicial review decision.

On 27 March 2013, PT AS commenced execution of the 1st Judicial Review Decision and in carrying out the execution proceedings, felled oil palm trees and destroyed buildings and infrastructure, resulting in damage to approximately 1,500 hectares of land.

On 23 April 2014, PT SHE filed a claim at the District Court of Batu Licin against PT AS for the sum of IDR 672.8 billion (approximately MYR 205.4 million (USD 50.45 million) for loss and/or damage caused by PT AS in executing the 1st Judicial Review Decision.

On 20 January 2015, the District Court of Batu Licin decided in favour of PT SHE and awarded damages in the sum of Indonesian Rupiah (IDR) 69.9 billion (approximately MYR 21.4 million (USD 5.25 million) and on 13 February 2015 issued a written decision (District Court Batu Licin Decision). On 29 January 2015, PT AS filed an appeal to the High Court of Kalimantan Selatan, Banjarmasin against the District Court Batu Licin Decision.

On 10 February 2016, the High Court of Kalimantan Selatan, Banjarmasin ruled in favour of PT AS on the ground that the same subject matter (claim for execution/compensation) and the same object matter (being 60 hectares of land in Desa Bunati) had been deliberated and decided by the High Courts and Supreme Courts. Thus, PT SHE is not entitled to bring the same action before the District Court of Batu Licin (3rd High Court Decision).

On 22 February 2016, PT SHE filed an appeal to the Supreme Court against the 3rd High Court Decision. On 28 March 2016, PT AS filed its reply to PT SHE's appeal.

According to Dato' Azmi Mohd Ali, regarding the above case, even though the above case has been settled, SDPB still suffered a loss of MYR 100 million (USD 24.56 million).

3.5.2. New Britain Palm Oil Limited ("NBPOL") v. Masile Incorporated Land Group ("Masile"), NBPOL v. Rikau Incorporated Land Group ("Rikau") & NBPOL v. Meloks Incorporated Land Group ("Meloks") [31].

On 30 August 2011 (prior to the acquisition of NBPOL by Sime Darby Bhd on 2 March 2015), NBPOL initiated three separate legal actions against Masile, Rikau and Meloks (collectively, Defendants) in the National Court of Justice at Waigani, Papua New Guinea (Court). All three (3) actions relate to the same cause of action in that the Defendants had failed to carry out their obligations to surrender the Special Agricultural Business Leases (SABLs) to NBPOL for registration of the sub-leases despite having received benefits under the sub-lease agreements (SLAs), which include, rent paid by NBPOL for the customary land of 3,720 hectares (Land), royalties for the fresh fruit bunches harvested from the Land and 31,250 ordinary shares in NBPOL issued to each of the Defendants. NBPOL sought orders for specific performance requiring the Defendants forthwith deliver to NBPOL the SABLs to enable the sub-leases to be registered in accordance with the Land Registration Act.

By an Amended Statement of Claim dated 3 November 2014, in addition to NBPOL's claim for specific performance for the Defendants to surrender their SABLs, in the alternative, NBPOL claimed compensation for costs incurred by NBPOL in developing the land into an oil palm estate amounting to PGK 30.7 million (equivalent to MYR 38.9 million – USD 9.56 million), compensation for appreciation of the value of the land due to the development by NBPOL and compensation for 31,250 ordinary shares in NBPOL issued to each of the Defendants pursuant to the SLAs.

The Defendants in turn via their Defence and Cross-Claim filed on 23 April 2012, Amended Defence and Cross-Claim filed on 9 September 2012 and Further Amended Defence and Cross-Claim filed on 11 December 2014, cross-claimed amongst others, that the SLAs were unfair and inequitable agreements, and should be declared invalid, void and of no effect as well as damages for environmental damage and trespass to property by NBPOL.

Trial relating to the Meloks claim commenced from 18 July 2016 to 22 July 2016 and was adjourned to 1 November 2016 to 7 November 2016.

3.5.3. Legal Action against PT Adhiyasa Saranamas (PTAS) [26-31].

PT Adhiyasa Saranamas (PTAS) commenced a legal suit on 17 September 2003 against Kumpulan Guthrie Berhad (KGB) (now a part of SDB) and 6 of its Indonesian subsidiaries for an alleged breach of contract with regard to the provision of consultancy services in connection with the acquisition of subsidiaries in Indonesia. On 4 March 2008, the Decision on Further Review partially approved PTAS' claim and ordered KGB to pay the amount of USD 25.76 million together with interest at the rate of 6% per year thereon as of the date of the registration of PTAS' claim at the District Court of South Jakarta until full payment.

On 27 May 2009, KGB requested the postponement of the implementation of the said decision until corresponding legal proceedings in Malaysia are concluded. KGB's request was however rejected and on 10 June 2009, the District Court of South Jakarta issued an order of execution against four land titles (assets) of PT Aneka Intipersada (PTAI), PT Kridatama Lancar (PTKL), PT Teguh Sempurna (PTTS) and PT Ladangrumpun Suburabadi (PTLS), 4 subsidiaries of the Group in Indonesia and requested for assistance from the relevant/respective district courts in which jurisdiction the assets are located to effect the order of execution (SJ District Court Order). PTKL, PTTS and PTLS have successfully defended the execution proceedings over their respective assets at the District Court of Sampit and the District Court of Kotabaru (District Court Decisions) and PTAS has appealed against the District Court Decisions given in favour of PTKL, PTTS and PTLS. PTKL and PTTS have on 13 June 2011 been served with PTAS's memorandums of appeal in relation to PTAS's appeals at the High Court of Palangkaraya and counter-memorandums of appeal have been filed by PTKL and PTTS to the High Court of Palangkaraya through the District Court of Sampit on 14 June 2011. PTLS has received a letter from the High Court of Banjarmasin informing it that the appeal by PTAS has been registered on 27 May 2011 and PTAS's memorandum of appeal has been served on PTLS on 23 June 2011. A counter-memorandum of appeal has been filed by PTLS to the High Court of Banjarmasin through the District Court of Kotabaru on 30 June 2011. The District Court of Siak Sri Indrapura had on 10 January 2011 issued a Stipulation on Executorial Attachment and the Minutes of Executorial Attachment No. 01/DEL/PDT.EKS/2011/PN.Siak against PTAI to execute the SJ District Court Order (Siak Sri Indrapura Executorial Attachment). PTAI had on 27

January 2011 filed a Rebuttal (Perlawanan) at the District Court of Siak Sri Indrapura registered under Case No. 01/Pdt.Ver/2011/PN.Siak to oppose the Siak Sri Indrapura Executorial Attachment order over PTAI's assets. The hearing of PTAI's Rebuttal application is now fixed on 29 September 2011 to allow for the submission of Conclusion (*Kesimpulan*) by the parties to the proceedings.

In Malaysia, PTAS commenced a legal proceeding against KGB to enforce the Decision on Further Review on 11 March 2008. On 2 December 2009, KGB's Striking out Application was allowed by the High Court of Malaya and on 28 December 2009, PTAS/the Appellant filed an appeal to the Court of Appeal. At the hearing of the appeal on 16 March 2011, the Court of Appeal allowed the Appellant's appeal. The matter is now fixed for case management at the High Court on 27 October 2011 and parties have been directed to file their list of witnesses and witness statements prior to 27 October 2011. The trial was concluded on 10 May 2012 and on 14 June 2012, the High Court dismissed PTAS's claim with costs (High Court Decision). On 15 June 2012, PTAS appealed to the Court of Appeal against the High Court Decision (Appeal) and on 7 November 2013, the Court of Appeal dismissed the Appeal with costs of MYR 20,000 (USD 4,905.99).

On 5 December 2013, PTAS filed a notice of motion for leave to appeal to the Federal Court against the Court of Appeal's decision (Leave Application). At the hearing of the Leave Application on 22 May 2014, PTAS's counsel failed to attend court and had by a letter of the same date, requested for a postponement of the hearing. The Federal Court rejected the said application and proceeded with the hearing. KGB's counsel submitted that the parties had already entered into a binding settlement of the Indonesian Judgment, which is a matter determined under Indonesian law. The Federal Court held that the cause of action had been extinguished and dismissed the Leave Application with costs of MYR 10,000.00 (USD 2,445.14). The Federal Court also ordered a deposit of MYR 1,000 (USD 245.30) to be paid to KGB as part of the costs. Consequently, the Malaysian legal proceedings have now come to an end.

This case has been also partly reported in the Malayan Law Journal with citation [19].

4. Analysis

The above litigation cases involving land for palm oil plantation investment in Indonesia are caused, in the opinion of the authors, by the followings factors [16],[17]:

- a. Inadequate coordination between the central, provisional and local governments in land approval for palm oil plantation ventures;

- b. Conflict with local people over palm oil plantation lands;
- c. Unclear land ownership and its boundary leading to fraudulent claims and disputes;
- d. Inadequate infrastructure and plantation land facility;
- e. Unauthorised palm oil plantation land development including failure to get *ijin lokasi* (location permit) and *Ijin Usaha Perkebunan* (Plantation Work Permit) from the authorities;
- f. Scarcity of lands for palm oil plantation ventures;
- g. Acquisitions of the land for palm oil plantation ventures are on leasehold, not permanent in perpetuity; and,
- h. Corruption in palm oil plantation ventures.

The above factors have been elicited from interviews from relevant persons. The followings are excerpt of interviews from relevant respondents in respect of some of the above issues, to prove the existences of the above facts, phenomena and issues, viz:

4.1. Inadequate coordination between the central, provisional and local governments in land approval for palm oil plantation ventures

The law of Indonesia can be divided into two (2). Firstly, the central law. Secondly the provincial and local laws. The central law is governed by the authorities in Jakarta, while the provincial and local laws are managed by the authorities in the provinces and local authorities such as the Governor, Bupatis and Camats (District officers). Due to the separate laws there are issues of coordination between the central authority and the provincial/local authority (Abdul Mutalib, Personal Communication, March 10, 2016)[15].

On the function of Bupati, according to [15] Nor Hazlan Abdul Mutalib, being an officer in Association of Palm Oil Investors of Malaysia in Indonesia (APIMI), in Jakarta said [15]:

“The local autonomy in Indonesia is in the hands of the provincial Governor or the Bupati (district officer). The Bupati is the one who normally has full control of the businesses and district regulations. They (governors) are the one who control the region...the Bupatis have the power to issue permits for businesses especially in plantation operations. That’s why I always advise our Malaysian companies especially our GLCs who wished to invest here (in Indonesia) please do not associate yourself with politicians. That’s very dangerous. For example, you say “Ooo we know Jokowi”. Then, problem (will happen) if the Bupati is not the same political party with Jokowi,

you are in big trouble because they are the ones who control the business there, they’re the one who give you the relevant permit...”

4.2. Conflict with local people over palm oil plantation lands

According to Kailani being an Assistant Bupati of Muarojambi [10]:

“Conflict between the land proprietors and palm oil investors is mainly due to land issues and land ownership. It can be in the form of dispute of ownership of the lands. Normally, the authority (the administrators – Bupati, Camat, Governor) will interfere in order to settle the disputes. The existence of local NGOs also has made the issues become complicated and hot. The people will not resort to legal process in court, unless it involves criminal act for example theft. The disputes are settled through negotiations (musyawarah) between the land proprietors and the palm oil investor operators. The reason as to why the proprietor people do not resort to legal process in court because they are weak people, they do not have documentary evidences and insufficient proof to support their claims. They will lose compared to the palm oil investor operators who normally have adequate evidences and proof. It is a norm that ownership of land in Indonesia is through the evidence of customary practice and word of mouth from generation to generation. There is no documentary evidence. Of course, this may lead to false claims and land frauds. Injustices may happen...if the plantation land involves indigenious people for example in Muarojambi and Batang Hari, there are ‘suku anak dalam’, the operator investors are required to provide new settlement areas for them in replacement of the palm oil plantation lands that ‘suku anak dalam’ occupied. Nonetheless, many of them – ‘suku anak dalam’ cannot conform to the new settlement areas. They prefer to live in the forest jungle in nomadic way. The operator investors are also required to provide adequate health facility and others livelihood means to enable ‘suku anak dalam’ to live and carry on their daily usual bread and butter subsistence in the new settlement areas”.

On the version of Ir Saduddin, being an officer in Dinas Perkebunan (Department of Agriculture) at Jambi, where he said [24]:

“the disputes may be resolved through customary practices among the local people. Usually through adat/customary law. The heads of the adat will be involved to determine the disputes. There will be negotiation, arrangement and they seek the disputant parties to compromise. Usually a special event is initiated and conducted by these persons and some festive food event involved (majlis makan-makan)”

On the other hand, according to Sofyan Djalil, Minister of Land and Spatial Planning of Indonesia in Jakarta [21]:

“if warranted the dispute settlement among the disputant parties will involve officers from the Ministry of Land and Spatial Planning. They will become the mediators in the ‘plasma’ and ‘inti’ palm oil plantation ventures. The conflicts are diverse involving many issues. The issues may involve native people, between the urban and rural people etc. One of the ways to settle the disputes is by providing certain laws/directives, by the Ministry, to resolve the disputes”

On conflict between the land proprietor and the palm oil investor, Sofyan Djalil, said [21]:

“There are many conflicts between the local land proprietors and the palm oil investors. This includes unfair treatment and breach of contract by the investors to the land proprietors whose lands have been used for palm oil plantation. Usually, the land proprietors were paid less than what had been promised by the investors. This includes also inadequate compensation to the land proprietors.

While according to Septiansyah Q Riza, an Indonesian lawyer in Jakarta [23]:

“land disputes may arise due to the expiry of HGU (Hak Guna Usaha-Right to Operate). Normally palm oil plantation cycle takes about twenty five (25) years. After the expiry of twenty five (25) years, the operators need to do replanting. Five (5) years earlier before the end of that twenty five (25) years, the operators need to apply and renew HGU. If delayed, the HGU will be cancelled and the land will revert to the government. This is normally realized by the local people. On this realization, the local people will enter these lands on the pretext that the lands have now being reverted to the government. They will grow plantation crops there. Due to this, disputes will arise between the palm oil operators and the local people. If the operators wish to resume the plantation, they have to compensate the local people due to the demolished plantation crops. Even though the local people crop plantation activities were illegal. Land disputes may also arise from the issue of illegal squatters residing on the palm oil plantation lands. The illegal squatters and their ancestors have occupied illegally the land which was once a forest jungle land, before its conversion into palm oil plantation. They lived on the land illegally for years. When it comes to provincial election for appointment of Bupati, they came to see the prospective contestants to give support and in return if the contestants win, they in return should support the illegal squatters occupying the land. That is the politics. Even though HGU has been later given to the operator investors enabling them to carry out palm oil

plantation yet the illegal squatters still do not hesitate to resume occupying the lands”

To Edy Rosmawanto of Gabongan Pekebun Kelapasawit Indonesia (GAPKI) in Jambi, Indonesia where he illustrated an example of land conflict involving palm oil plantation in Indonesia as follows [5]:

“the issue can involve claim of compensation. The first claimant might have alleged that a land, that had been subject to palm oil plantation ventures, spearheaded by the palm oil operator investors, belonged to him. He received compensation from the operator investors. But when it comes to the plantation stage, a second claimant appeared and admitted that the particular land was his. He brought all evidences to prove his claim. This has caused conflict between the claimant land owners and the operator investors. Normally in this situation, the settlement of dispute may involve the head of the village (kepala desa). But the court favoured the first claimant as there was a contract entered into with the operator investors. Thus, the second claimant will not get any compensation from the operator investors.”

On the issue of injustices done by the palm oil investors to the land owners, issues of land legal ownership and the role of provincial authority to settle disputes, according to the former Jambi Governor, Hasan Basri are as follows [6]:

“The function of Bupati is vital in settling disputes and carrying negotiations between the land owners and the investors. This matter must be implemented carefully and be fair to both parties. Otherwise, this can become a political issue. Sometime, the investors do not fulfil their promises to provide the agreed reciprocating benefits in return to the land owners. This can lead to conflicts. Usually this issue is settled through negotiation, not through court’s legal process (Pengadilan Negeri) between the land owners and the investors. In this respect, the Bupati or Governor acts as the negotiator. The dispute mechanism between land owners and investors in palm oil plantation ventures usually use this method, i.e. negotiation headed by the Bupati or the Provincial Governor applying humanistic approach, not through court’s legal process”.

Similarly, Dr. Martin Roestamy, a legal expert from Djuanda University, Bogor. He said [11]:

“Then there is an issue of land boundary involving border between Malaysia and Indonesia. This happened in Kalimantan, involving Guthrie Malaysia. The border signs have been taken off and thrown away. This caused conflict between Malaysia and Indonesia. Border fraud...Another issue on land in Indonesia that has caused difficulty for the palm oil operators is the acquisition of lands. The

Indonesia governing law of land acquisition is incoherent and seems to be of people centric, unfavourable to private developers to acquire and develop the land into palm oil plantation and opening up new palm oil estates. Another example is the proposed toll free project from Chawi to Sukabumi with a distance of 52 km. Even 6 years having passed the proposed project has still not yet been started. Why? Because the authority does not have power to force the people to give up their lands for development of the toll free road. The travel from Sukabumi to Bogor, about 52 km, takes about 3 hours. Why this happens? This is because of the issue of land acquisition from the people and that the land proprietors demand expensive compensation, which are not affordable for the authority to provide. Of course, there is land acquisition law in Indonesia – Undang-undang Pengadaan Tanah, No. 11, 2012 which empowers the authority to acquire private lands for public purposes, yet the authority does not invoke this provision, as they are afraid of contravening human rights of the private land owners. Otherwise, the private land owners will sue the authority”

On settlement of land disputes according to Septiansyah Q Riza, where he said [23]:

“Usually land disputes are resolved through negotiation involving the local community, palm oil plantation operators (investors), local leaders and non-governmental organizations (NGOs). Sometime the dispute is resolved through compensation payment by the palm oil investors... Very often the disputes can be lessened through implementation of CSR by the palm oil operators such as provision of access roads, food, water, public amenities and schools to the affected communities. The operators are compelled to collect funds to finance the provision of security and common facilities facilitating due progress of their palm oil plantation ventures such as establishment of police stations and other security posts. This is because the security facilities are not provided by the central, provisional and local governments in new or remote areas in Indonesia.”

While pursuant to an interview with Nasrul Hadi, from GAPKI, Jambi, Indonesia, where he said [14]:

“court’s legal process is time consuming and this is not attractive to the disputant parties to seek legal redress. They prefer negotiation”

According to Sofyan Djalil [21]:

“The land law in Indonesia is not as that good as in Malaysia. Thus, you can see many issues. For example, there is no policy and law on land reservation in Indonesia”

4.3. Unclear land ownership and its boundary leading to fraudulent claims and disputes

In respect of the above, according to Daud Amitzin, being the Chairman of Incorporated Society of Planters (ISP) in Kuala Lumpur stated [4]:

“That’s challenging (on legal uncertainty). You cannot make generalization and then there is the reason why investors are afraid to invest in Indonesia”

According to Dr. Martin Roestamy [12]:

“There are many land cases that have been determined by judges who have no expertise in Indonesian land law...there are a few land law experts who have become the supreme court judges. The land law in Indonesia is complicated and bulky. It requires the real land law expert to deal with land issues in Indonesia. As the land litigation is complicated and involves diverse law, it results in the legal fee expensive”.

While, the former Jambi Governor, Hassan Basri stated that [6]:

“Most of lands in Indonesia do not have land certificate. Many palm oil plantation ventures are carried out on lands that have no land certificate. The palm oil plantation lands are usually involving forest lands. This is one of the issues of land administration in Indonesia has to face”

Dato’ Azmi Mohd Ali, a lawyer in Kuala Lumpur, said [1]:

“On the issue of land ownership, Indonesia used the Dutch Law. The Dutch land law is not as comprehensive as the English land law. Maintenance of land title, land ownership...the legal system and court’s process in Indonesia also involves huge costs to the parties. Apart from this, uncertainty in the law, the judicial and legal system has posed certain problems and issues to the Malaysian MNEs in Indonesia. Indonesian legal system is inefficient, incompetent and the legal cost is high. The lawyer’s cost is expensive. Unlike in Malaysia where any foreigner can come to Malaysia and opens up companies. The cost of incorporation is around MYR 3,500.00 only (USD 858.591). In Indonesia, to open up a company, the applicant must have a capital of MYR 130,000.00 (USD 31,888.96) and incorporation cost of MYR 30,000.00 (USD 7,358.99). The lawyer’s cost is between MYR 20,000 to MYR 30,000 (USD 4,905.84 to USD 7,358.99). Any opening up of company by foreign persons must tally with the concept of PMA (penanaman modal asing – tapping foreign investment) policy. Companies that are owned by foreign persons are called PMA Company. PMA company cannot be incorporated if it does not have a minimum of capital of MYR 150,000.00 (USD 36,797.91), if I am not

mistaken. Unlike in Malaysia, whereby any foreign person can open up their companies in Malaysia even at the cost of MYR 2.00 (USD 0.490639). Then the foreign investors must deposit their investment of at least MYR 190,000 (USD 46,607.88). Further, Indonesian lawyers said there are many uncertainties in the Indonesia laws. The laws are complicated than the Malaysian laws. In addition, there are uncertainties in the legal interpretation of the laws. Compared to Malaysian courts, courts in Indonesia do not have the concept of *stare decisis*, judicial precedents etc that can ensure uniformity of the laws. In Malaysia, if we were to find relevant laws, we can scrutinize the judgments of the courts – lower and higher courts. Thus, the laws in Malaysia are certain and predictable than in Indonesia...The problems in the uncertainty of the law were faced by SDPB in Indonesia evidenced by many cases that SDPB faced. As a result, Sime Darby suffered losses. In Indonesia there are also issues in the lack of enforcement of the laws. Even among 3 and 4 Indonesian lawyers, they have different interpretations of certain legal provisions. Unlike the legal situation in Malaysia, where we have uniformity of the legal system and the laws are predictable. It follows that, Malaysian MNEs must have relevant expertise in dealing with the legal uncertainties in Indonesia. Otherwise, they may suffer losses. They must have a lot of monies. Apart from uncertainty of the laws, issues of legal interpretations and legal manipulations, there are environmental pollution issues, for example in Kalimantan and in Sumatera. SDPB suffered a loss of MYR 100 million (USD 24,529,522.48). The trespassers cut off the palm oil trees belonging to SDPB in the area of 1,000 hectares. SDPB was taken aback by this incident. SDPB reported to the Indonesia police, went to court, used Indonesian lawyers, as well as using the Indonesian Armed Forces to help out Sime Darby. At last, SDPB still suffered a loss of MYR 100 million (USD 24.5 million).”

Refer also to the legal action against PT Anzawara Satria as illustrated before this.

The above issues highlighted by Dato’ Azmi Mohd Ali is also supported by Ahmad Lutfi Abdull Mutalip, a lawyer in Messrs. Azmi & Associate in Kuala Lumpur. He said [1]:

“...I think there are a lot of problems in land ownership in Indonesia because of multiple claims on the same plot of land by many people...today I come to you and say - this is my land. Ok, let’s assess its value, then I pay you the purchase price. Then tomorrow next person says this is his land...I think, there were misrepresentations done by many people on ownership of land in Indonesia. For example, this particular land is situated in district A but actually it is located in district B. Further, in most of areas in Indonesia there is no infrastructure, for example proper road. This has caused difficulty to prospective investors.”

4.4. Inadequate infrastructure and plantation land facility

The inadequate infrastructure leading to the palm oil plantation estates is also a big issue to deal with. For instance, in the observation of one of the authors during his field work research at Jambi, Indonesia, he found that the public road leading to the plantation of palm oil estate owned by PT Bahari Gembira Ria a subsidiary of PT Minamas wholly owned by Sime Darby are full of holes, potholes and undulating, being hollow road causing inefficiency to planters and investors to go into and out from the palm oil estates. On part of the local government, there is no adequate approach to settle this inadequate infrastructure. GAPKI too has called for the Indonesian government to use the CPO fund to upgrade the supporting infrastructure of the industry in a bid to improve the competitiveness of Indonesian products. Due to the inadequacy and poor infrastructure the price of Indonesian palm oil products are discounted at USD 15 to USD 20 compared to Malaysia products [34].

4.5. Unauthorised palm oil plantation land development including failure to get *ijin lokasi* (Location Permit) and *Ijin Usaha Perkebunan* (Plantation Work Permit) from the authorities

On the issue of unauthorised palm oil plantation land development including failure of the operators to get relevant permits such as *Ijin Lokasi* (location permit), and *Ijin Usaha Perkebunan* (plantation work permit) [15] said:

“I wish to mention a company. A company that has obtained the necessary permits and approvals from the Indonesian authorities. The permits that had been obtained included *Hak Guna Usaha* (HGU). So with the HGU the company could plant the palm oil. So, after sometime, the palm oil trees matured and bore fruits, i.e. after three to five years. Suddenly, Forestry Department came and said that the palm oil plantation was on a forest reserved land and thus the operator had broken the law. In the result, the operator objected to this finding and defended that HGU had been given to them to carry on the palm oil plantation. Nonetheless, this was rejected by the Forestry Department and that they--the operators must vacate the land and had to suffer losses. This matter had been brought to the court (*Pengadilan Negeri*) for determination. Hence, this is the peculiarity of the Indonesian legal system. There is a lack of one stop centre. Now the Indonesian authority proposes *One Map Policy* to avoid similar problem from happening in the future

Refer also to the land litigation involving SDPB in legal action against [31], [30] as illustrated above.

On the issue of delay in the investment process and plantation process is due to the delay in obtaining the relevant approvals (for examples Ijin Lokasi (location permit), Ijin Lingkungan (environment permit), HGU and Ijin Usaha Perkebunan (plantation work permit)) from the Indonesian authorities. This will result in waiting costs to the investors. According to Nasrul Hadi and Edy Rosmawanto of GAPKI in Jambi, Indonesia [18]:

“the approval may take up to 6 months and may be 5, 6 years due to the issue of bureaucracy and uncertainty of the policies”.

4.6. Scarcity of lands for palm oil plantation ventures

Due to limited land for palm oil plantation in Indonesia, the Malaysian MNE may not be able to carry out investment there. Hence, the foreign investors, including Malaysian MNEs, will carry out the investment through joint venture with the local operators in Indonesia. This evident in the interviews with Kailani, Assistant Bupati of Muarojambi and Bapak Ir Saduddin of Department of Agriculture, Jambi and Dr Fadhil Hassan from GAPKI [24], [6].

4.7. Acquisitions of the land for palm oil plantation ventures are on leasehold, not permanent in perpetuity

This is one of the factors that make the palm oil plantation investment in Indonesia not attractive to the Malaysian MNEs. Thus, this can discourage them from having long term investment in palm oil plantation ventures in Indonesia [2].

4.8. Corruption in palm oil plantation ventures

On the issues of corruption in upstream palm oil plantation in Indonesia, Dato' Azmi Mohd Ali said [2]:

“Corruption in Indonesia is a big issue...Sime Darby, officially, does not involve in corruption. What SDPB do is that they will cooperate with politicians, provincial and central governments and Indonesian Armed Forces in order to ensure that Sime Darby's investment in palm oil plantation ventures is protected”

Further, [4] said:

“because of the uncertainty of the law, unclear rules, inadequate transparency and good governance in the legal and government administrative machinery in the central,

provincial and local government, these have breed corruption in the palm oil plantation ventures. This is one of the factors that hinders many foreign investors to come into Indonesia”

While, [23] said:

“I agree that the issue of corruption occurs in administration of the state in central, provincial and local governments' levels”

Similarly, Dr Suritno and Ana Silviana of Faculty of Law, University of Diponegoro, Semarang, said [32]:

“The uncertainty of the law created by judges is due to the weaknesses of the civil law system as compared to the common law system. This can lead to corruption”

Upon pondering the above issues and challenges that are faced by the Malaysian MNEs in cross border palm oil plantation ventures, the followings are some approaches, in the opinion of the authors, that the Malaysian MNEs should adopt in dealing the issues arising from land acquisition for palm oil plantation ventures in Indonesia [16], [17].

- a. Create a good and favourable political connection with the President of Indonesia, regional Governors, District Bupati and Camat (District Officers) and the Indonesian Army;
- b. Get help through APIMI (Association of Plantation Investors of Malaysia in Indonesia) and Indonesia Malaysian Palm Oil Group (IMPOG) to help the investors dealing with palm oil land issues in Indonesia;
- c. Opt for takeover, merger and acquisition of Indonesian palm oil companies rather than opening up new lands for palm oil plantation ventures; and,
- d. Malaysia MNEs must have adequate funding, sufficient knowledge of the local law and hiring of local people and expertise to deal and ensure success of the cross border palm oil plantation ventures.

5. Conclusion

This writing shows that there are laws governing cross border palm oil plantation ventures in Indonesia. Even though this writing is meant specifically to land law issues, it also explains other related laws such as environmental law and investment law due to the intertwined relationship with the land law and its machinery in palm oil plantation ventures in Indonesia. Through this writing also, it is proven that palm oil plantation ventures in Indonesia is a big and serious task. The knowledge of land law, legal system and the Indonesian culture need to be comprehended by the palm oil investors. Apart from these, the MNEs must have sufficient funds to cover their costs

and expenditure. Otherwise, the purported venture may fail and the MNEs will suffer losses. This writing lists down land law issues that are frequently faced by the Malaysian MNEs in implementing palm oil ventures in Indonesia. In the opinion of the authors, the most important issue that Malaysian MNEs should be aware is that land law system and registration in Indonesia is not systematic, and incoherent. This leads to the unclear boundary issues, lack of land registration, uncertainty in land ownership, land fraud, and finally corruption. The legal system and judicial stance are also unclear, particularly the laws, its application and the inadequate expertise of the judiciary in land law and its intricate issues in Indonesia. Thus, it is incumbent upon Malaysian MNEs who wish to undertake palm oil plantation ventures to avoid problems arising from this aspect. Very often, good relationship and connection with the people in power for example the regional authority and the armed forces are needed to support and sustain their palm oil operation. Apart from these, the existence of APIMI, IMPOG and other round-table discussion and negotiation with the Indonesian authority and stakeholders will help Malaysian MNEs to resolve disputes and deal with problems in their undertaking business of palm oil plantation ventures in Indonesia.

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