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A conditional trinity as ‘no-go’ against non-credible development? Resettlement, customary rights and Malaysia’s Kelau Dam

Bin Md Saman Nor-Hisham and Peter Ho

The eruption of contestation is likely when development projects involve the displacement and resettlement of local communities, such as for dam-building, mining and plantations. Impact assessments are regarded as critical to mitigate a project’s adverse effects. However, development projects are *institutional* interventions and dependent on the *endogenously grown* context in which they are implemented. An oft-disregarded principle is that land-based institutions in a rural, developing context play a role in the provision of social security and welfare, rather than functioning for economic transfer. When that function is not acknowledged, the impact assessment – be it an environmental impact assessment (EIA), social impact assessment or hydropower sustainability assessment – merely serves as ‘window-dressing’ to legitimize the imposition of institutions that inevitably evolve into empty or non-credible institutions. The paper provides a compelling case: the resettlement of the Orang Asli, a Malaysian indigenous community, whose land was usurped for the Kelau Dam. By utilizing the Formal, Actual and Targeted (FAT) institutional framework (see Introduction, Ho 2016), it is demonstrated that the impact assessment served the supposition of communal rights by non-credible, private title. It is concluded that improved implementation perhaps does not lie in the impact assessment, but rather in distinguishing pre-conditions that constitute a ‘no-go-area’.

Keywords: development-induced displacement and resettlement (DIDR); dam building; FAT institutional framework; endogeneity and credibility; land as social welfare

1. Introduction

The government told us to move, so we had to move. However, if we would have had an option, we would not have done so.

(oral communication, Cham Beng, headman or Batin of the indigenous Orang Asli, RSLB, 24 November 2012)

Much of the contestation of large development projects revolves around the expropriation and resettlement of local communities. National, non-governmental and multi-lateral entities have formulated guidelines and protocols to minimize and avoid development-induced externalities. These have been increasingly specialized and diversified for particular issues and sectors leading to a confounding variance of guidelines such as the environmental impact assessment, the hydropower sustainability assessment, the biodiversity impact assessment, the health impact assessment and the social impact assessment. Yet managing the impact of development interventions – contrary to such claims (e.g., De Jesus 2009) – is not a matter of meeting procedural requirements or increased specialization. Development

projects are acts aiming at *institutional* change and will therefore, by definition, become part and parcel of the larger, endogenously evolved context in which they are implemented (Grabel 2000, 1).¹

It is why improved implementation does not exist in impact assessment procedures that are more elaborate or integrated, but rather in contemplating institutional function prior to considering intervention. Stated differently, a refocusing on project implementation and impact assessment is required in which the fact is accounted for that *existing* institutions have emerged as functional adaptations from an endogenous, spontaneously ordered evolution (Ho 2013). It is a principle that harkens back to the classical concept of spontaneous order as suggested by Ferguson (1782) and Menger (1883).² When institutional interventions contradict that development, they are likely to result in either empty or non-credible institutions. As argued elsewhere in this volume, whereas the empty institution is a symbolic, less disputed arrangement, yet fully decoupled from actors' praxis (Aalders 1984; Sumner 1906, 77; Aubert 1966), the non-credible institution is contested, causing significant conflict and cleavage.³

It can generally be ascertained that in rural, resource-poor communities that lack alternative employment opportunities outside of agriculture, land is a source of livelihood and security, rather than a market commodity (Charlesworth 1983; Ilbery 1984; Davy, Davy, and Leisering 2013). Under such conditions, institutions around land have endogenously evolved to function for the provision of social welfare, rather than to cater for its commercial transfer. As Guhan (1994, 40–41) duly noted: 'In the agricultural economy, land is the primary asset from a subsistence point of view: it provides food security, enables utilization of family labour, and reduces vulnerability to labour and food markets'.

The social welfare function of land has a dual implication: (1) one cannot harmlessly take away land from those dependent on it; (2) one cannot exogenously design and subsequently implement a new property rights regime, as the form of institutions follows from their function, and not the other way around. Ergo, the informality and communality of institutions is a result of what they do and mean for a community of actors. Changing that form, for instance, towards formal and private arrangements, cannot be achieved without a change of the function.

This contribution provides an imperative case confirming the argument. For this purpose, we will zoom in on a large development project in Malaysia: the Kelau Dam. The case is important for two reasons. For one, the Kelau Dam Project (hereafter: KDP) – a little-studied project to date – is representative of a series of mega projects around the world, which have led to significant social cleavage and conflict, not in the least because of the displacement of local communities (e.g., Isaacman and Isaacman 2013; Verhoeven 2016). In fact, the case of the KDP and resulting eviction of an indigenous rural community, the Orang Asli, should be seen in a wider global context of what has been dubbed 'development-induced displacement and resettlement' or DIDR (Satiroglu and Choi 2015), i.e., expropriation and eviction for large-scale development and infrastructural projects (Penz, Drydyk, and Bose 2011). Second, the KDP illustrates in detail how assessment procedures – in this case, the environmental impact assessment or EIA – are misused

¹In this context, Grabel aptly notes that the credibility of institutions is 'always secured endogenously ... rather than exogenously' (2000, 1).

²For more information, see the discussion in the Introduction to this collection by Ho (2016a).

³For a detailed discussion of the conceptual distinction between the 'empty' and the 'non-credible' institution, please refer to the contribution on grasslands, mining and pastoralism (Ho 2016b).

to legitimize a development intervention that contravenes an endogenously emerged pattern of institutional arrangements.

Three research questions guide the analysis: (1) What are the institutional changes in property rights over time that accompanied the establishment of the Kelau Dam? (2) To what extent was the existing institutional function of customary rights by the indigenous population, i.e., the Orang Asli, taken into account by the Malaysian government? (3) What is the level of credibility of the newly established private property regime after resettlement?

In answering these questions, two concepts need further specification – function and credibility. The former is defined as the role or purpose that actors accord to institutions as these have spontaneously emerged as a spatio-temporal adaptation to the environment. Differently worded, institutions once having surfaced from actors' multitudinous and incessant interactions essentially constitute a functional and contextual adaptation; if not, they change, atrophy or become extinct (Ho 2013, 1095–96). The latter term, credibility, is conceptualized as actors' 'perception of endogenously, autonomously shaped institutions as a common arrangement' (Ho 2014, 16), and as such is a measure of how actors perceive institutions as a commonly shared rule. A critical dimension of the definition of credibility as the perception of institutions as a common rule is related to the game that is played. Economic agents' and social actors' 'game' is not one in which institutions can be intentionally formed by an external or exogenous agency. Contrarily, the game knows no external agency because all are in the game, be they state, civic or corporate actors, while the institutions that govern the game are the autonomous results of endogenous power differences and interactions between actors.

The paper is organized as follows. The next section presents the methodology, the survey sample, the interview design and the literature research, as well as the principal components of the Formal, Actual and Targeted (FAT) institutional framework, which is used to analyze the temporal shifts in property rights. Section 3 provides essential background information about the KDP in terms of its stated rationale, size, planning and impact. Section 4 begins by analyzing the underpinning politics and vested interests that drive the development of the dam project, after which it will show how the EIA was employed to legitimize and impose the KDP. The fifth section charts the change of the Orang Asli's customary property rights at two time points, before and after resettlement. The concluding section ascertains that the contemplation of function for improved project implementation could involve posing three conditional questions, which can help in identifying the moment for terminating the impact assessment *and* the project it is supposed to assess.

2. Methods, survey and sample

Whereas institutional credibility can be examined through various proxies (Ho 2009, 2014), in this paper, it is mainly assessed through actors' aggregate perceptions of endogenously grown institutions as a common agreement, i.e., the social support to rules at an aggregate level.⁴ In this case, we evaluate the degree to which the Orang Asli indigenous people

⁴Ho (2009, 186) has proposed several proxies for measuring the institutional credibility: 'the level of conflict that an institution generates; the extent of "institutional robustness" expressed as a function of institutional lifespan and flexibility; the degree to which an institution facilitates or frustrates overall socio-economic, political and cultural change; and the extent to which an institution fulfils the functions it ought to perform in the eyes of social actors'. The methodology for measurement of these proxies is further detailed in Ho (2014).

perceive institutions as a collectively shared rule. These institutions include the EIA and the expropriation procedure, as well as (customary and state-accorded) property rights.

The institutional analysis is accomplished through ‘mixed methods’ (Creswell 2003; Brannen 2005) or ‘multi-angulation’, i.e., the use of multiple sources that include ‘*quantitative*’ information gathered through surveys or data mining, or available in government or enterprise statistics, and ‘*qualitative*’ data gathered through interviews, participatory observation, focus groups, literature and archival research’ (cf. Figure 1 in the Introduction to this collection, Ho, 2016a, 1131, emphasis in original).

The interviews and survey revolved around two themes: (1) respondents’ opinions on the EIA; and (2) their perspectives on expropriation and its impact on customary land institutions. Other issues were also investigated including views on rent-seeking and trust in the federal and local government; however, those are not reported here. The first theme was probed in terms of questions such as perceived levels of local participation, voluntary consent, and state compliance with procedures. The latter theme concerned questions on compensation, vocational training, the availability of land for livelihood, and the effects of resettlement on customary institutions.

Since the Orang Asli had already been relocated at the time of the fieldwork, the survey was conducted at the resettlement site. Preliminary data collection was performed three times, from May to July 2012. Due to the sensitivity of the topic, considerable time and effort had to be spent in gaining safe access to the research site and to the respondents. Informants were specifically asked if they wanted their names to be protected, and if so, these have been rendered anonymous or changed. As the resettlement targeted a single, small community, the sample sizes for the full survey and pilot are limited (37 for the former, and seven for the latter). Both were conducted in November 2012. A second, larger survey ($n = 220$) was also carried out in 10 villages for the much-contested Bakun Dam,⁵ but is not reported here for reasons of space.

Although the sample itself is not representative (its features are described in Table A1 in the Appendix), a higher degree of representativeness was attempted through multi-stage cluster sampling (Babbie 2010; Neuman 2011).⁶ In addition, theoretical saturation was used to determine the sample size, up to the point where additional data provided no new insights into the research questions (Morse 2004; Small 2009). All surveys were executed by the main researcher without assistance from students, interpreters or others. To prevent bias in answering the questionnaires, a household-to-household approach was utilized while group meetings or group discussions were intentionally avoided.

To complement the quantitative component, semi-structured, in-depth interviews were carried out with local community leaders. Five interviews were organized with members of the Village Development and Security Committee (VDSC). Interviews were also arranged with a variety of stakeholders involved in the Kelau Dam (see list of interviewees and interviewed organizations in the Appendix).⁷ Lastly, the research also included literature and archival research on the larger Malaysian context of dam-building, EIA and customary land rights. For this part of the research, we relied on federal and local state reports, as

⁵The Bakun Dam survey was preceded by a pilot survey of 15 households. In addition, 16 semi-structured, in-depth interviews were conducted with local village leaders and peasants.

⁶Clustering was made according to the location of the housing blocks which were divided into five zones: east, west, back, entrance, and center. In this way, the survey aimed to ensure that all the Orang Asli resettlers received equal opportunity to be selected as respondents. The number of respondents represented 27 percent of the total population at the RSLB.

⁷Each of the interview sessions lasted between 60 and 90 minutes.

well as studies by non-governmental organizations (NGOs) and (semi)corporate organizations, such as the dam contractors and funding agencies.

To gauge how the dam-induced displacement affected property rights, the qualitative and quantitative data of the research are interpreted and analyzed according to the FAT institutional framework (see Introduction, Ho 2016):

- Formal: What property rights *should one enjoy*? (i.e., what property rights have been officially accorded to a group of social actors?);
- Actual: What property rights *does one have*? (i.e., what property rights does a group of social actors enjoy in practice?);
- Targeted: What property rights *would one like*? (i.e., what property rights do social actors commonly perceive as being needed?).

In the analysis of property rights, the FAT institutional framework might have added value in a two-fold manner. First, in contrast to a dichotomous conceptualization of formal versus informal, intended versus actual, or *de jure* versus *de facto* institutions, the framework adds an institutional continuum of what is desired. In this sense, the FAT institutional framework may provide critical indications for future institutional change. Two, actors' perceptions of the three dimensions can be regarded as the main parameters that *jointly* influence the endogenous emergence of institutional arrangements. With this conceptualization, the FAT institutional framework could be readily used to compare institutions at different time points and places. In this paper, this is accomplished by conducting the FAT institutional analysis at two points in time: t_1 , i.e., prior to resettlement; and t_2 , i.e., after resettlement. Before continuing to the empirical section, we will first present background information on the KDP.

3. The Kelau Dam project

3.1. Basic facts and figures

The KDP is located in the Bentong and Raub Districts in Pahang State (see Figure 1), the third largest state after Sarawak and Sabah and the largest in Peninsular Malaysia. The KDP is primarily designed to provide fresh water from the Pahang River to the Selangor State including the Federal Territories of Kuala Lumpur and Putrajaya. The project is calculated to transport 1890 million liters of raw water per day. With a length of 44.6 kilometers, the transfer tunnel for the KDP's water will be bored through the Titiwangsa Mountains and will be the longest in Southeast Asia and the sixth longest in the world. The dam reservoir will encompass approximately 27,000 hectares, thereby inundating the 16,800-hectare Lakum Forest Reserve, a free hunting and gathering area for the indigenous Orang Asli of Sungai Temir Village (see Table 1).

The KDP is sponsored by the Japanese government through Japan's development assistance and its subordinate development bank, the Japan International Cooperation Agency (JICA). A sum of RM 3.8 billion was granted as a 40-year soft loan (annual interest 0.95 percent) to finance a fraction of its total budget of RM 9 billion under the 'New Mizuoka's Rescue Package for Infrastructure Projects' (Furuoka 2008, 2011, 34).⁸ The KDP is one of the projects under the Eight Malaysia Plan (2001–2005), and construction

⁸It is a package offered to the countries which had been affected by the Asian Financial Crisis of 1997–1998 (Furuoka 2011, 1).

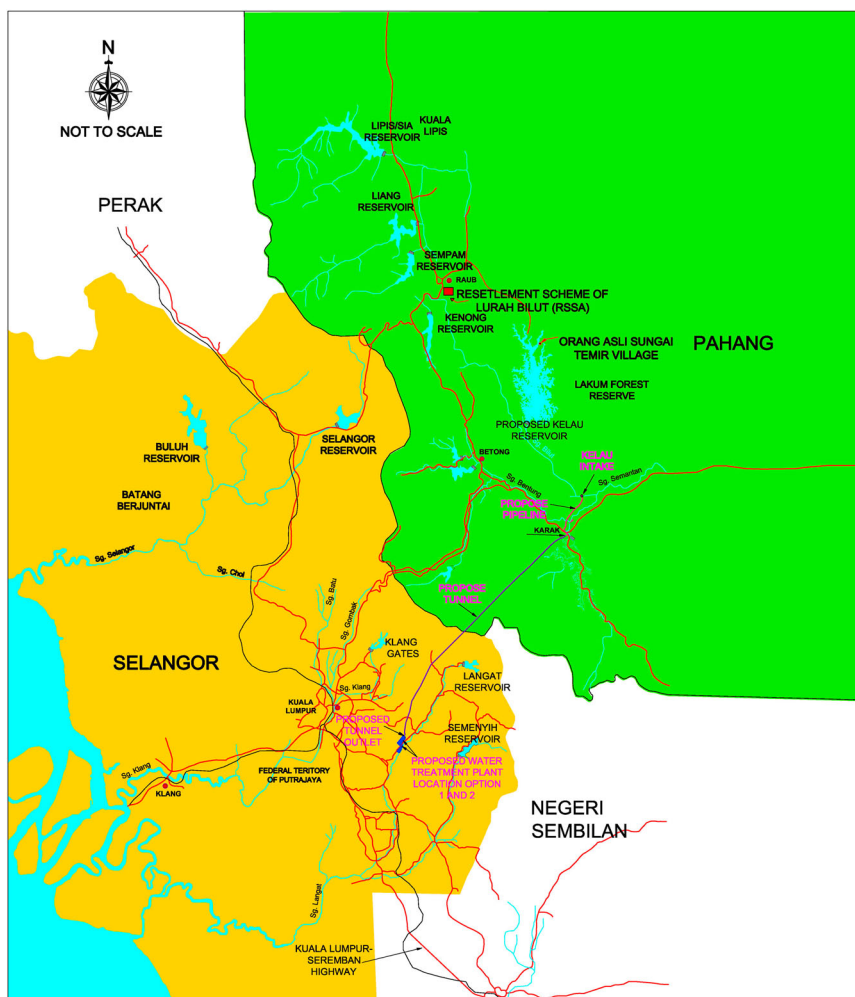


Figure 1. Location of the Kelau Dam Project and Sungai Temir Village.
Source: Illustrated by Nor-Hisham.

Table 1. Land areas affected by the KDP.

Land type	Area (ha)
Lakum Forest Reserve	16,800
FELDA Kelau Scheme	1934
FELDA Krau Plantation (Krau 2, 3 and 4)	101
Orang Asli Sungai Temir Village and Reserve	6354
Rancangan Tanah Pemuda (RTP, land resettlement scheme) ^a	222
Kurnia Setia Plantation	104
Ah Hong plantation (private land, Chinese ownership)	2084
Total	27,599

Source: DOE (2000, 2–22); MEGTW (2010, 22).

Notes: ^aThis land resettlement scheme is part of the agricultural and land development strategy developed by the Malaysian government in 1970, and aimed to improve the socio-economic position of the rural poor.

commenced in 2010. The construction works in Pahang involve the Kelau Dam, the Semantan water intake and pumping station, dual pipelines, and an underground tunnel. Meanwhile, in Selangor, the construction works will involve the remaining underground water transfer tunnel which begins in Pahang at the water treatment plant in Kuala Langat (known as Langat 2). The project owner and the proponent is the Malaysian federal government through the Ministry of Energy, Green Technology and Water (MEGTW), while the Department of Public Works has been entrusted to execute the project and monitor its progress.

It is noteworthy that the Langat 2 construction in the Selangor area is pending due to disagreement on the terms and conditions between the federal government and the Selangor State. The KDP was presumably to be in operation by 2014; however, this has been delayed to 2017.

3.2. Displacement and resettlement

To enable the KDP, an important, yet contested, component involved the displacement and resettlement of indigenous people. The planned dam reservoir area was no *terra nullius* but had been, in fact, inhabited by the Orang Asli, widely considered the first people of Peninsular Malaysia, for an extended period of time (Nicholas 2010; Hamid, Harun, and Syed-Nang-Mohamad 2011). The Orang Asli is officially considered an ethnic minority and a socio-economically weak group. The Orang Asli people constitute 0.63 percent of the nation's population. They feature an elevated incidence of poverty with 31.6 percent considered poor or extremely poor (EPU 2011; DOA 2012).

Legally speaking, the Orang Asli (and other indigenous peoples) are entitled to what is known as native title (Doolittle 2007). The term applies to the formal recognition of so-called Aboriginal Reserves and Areas for the Orang Asli in Peninsular Malaysia (HRCM 2008). Land rights are one of the key concerns expressed by ethnic minorities in the Economic, Cultural and Social Working Group of the Human Rights Commission of Malaysia (HRCM) (Idrus 2013).

Prior to expropriation the Orang Asli population lived in Sungai Temir Village, Raub District of Pahang State (see Figure 2).⁹ They customarily engaged in shifting cultivation and the exploitation of forest-based resources including hunting, fishing and gathering, while some also found employment in trade and retail as well as the logging industry. According to the Department of Orang Asli Affairs (DOA 2008), their numbers in Pahang State totaled 178,197. There is confusion as to the number of households residing in the relocation village; the reported number varies between 84 and 137.¹⁰

⁹Initially, the dam project involved the relocation of two Orang Asli sub-groups – the Temuan and the Che Wong sub-group from Bukit Lanchar (a village near Sungai Temir). However, due to a decrease in the dam level from 85 to 84 meters above sea level coupled with the persistent refusal of the Che Wong to relocate, they were allowed to remain at Bukit Lanchar (Edwards 2007; Oral communication with Collin Nicholas, a Coordinator for the COAC, in Subang Jaya, Selangor, 25 October 2011).

¹⁰The Ministry of Energy, Green Technology and Water recorded 84 (MEGTW 2010, 10). Yet the Department of Orang Asli Affairs counted as many as 137 previous to resettlement (DOA 2012). The increase can be explained by a dual factor: (1) young couples quickly married to qualify for a house and other forms of compensation (oral communication, Romziah Aziz, Project Assistant Director MEGTW, 18 August 2011); and (2) remigration by those who had previously remained outside of the village but returned to it in the prospect of potential compensation.



Figure 2. Main (and sole) entrance to the indigenous Sungai Temir Village.
Source: Photo taken by Nor-Hisham.

In January 2011, the Orang Asli were relocated to the Resettlement Scheme of Lurah Bilut (RSLB), approximately 40 kilometers from the original village.¹¹ At least 17 families refused to move (oral communication, Bedu An, former ‘Menteri’ or Minister, Sungai Temir, 3 December 2012). The RSLB encompasses an area of 600 hectares on which 123 houses were constructed by the Pahang State. Basic data concerning the settlements prior to and after relocation is included in [Table 2](#).

The Orang Asli households were each given a single-story house constructed on $\frac{1}{4}$ acre of land (see [Figure 3](#)), as well as private title to five acres of land (of oil palm) and one acre of orchard.

Land use in the resettlement village consisted of smallholdings of rubber and oil palm (150 acres); fruit orchards (35 acres); and multiple crops (12 acres). The proportion engaged in farming was 86.5 percent while the remaining respondents (13.5 percent) were working in ‘other categories’ such as contract laborers at (Chinese) farms, handicrafts, and doing multiple jobs. The latter types of occupation included catching and selling frogs, and trading jungle products such as rattan and bamboo. None had found employment outside of agriculture (oral communication, Bedu An, former Menteri, Sungai Temir Village, 3 December 2012; Cham Beng, Batin, RSLB, 24 November 2012). These figures are higher than the official figures which report 55 percent engaged in farming, followed by 41 percent working as contract laborers and other jobs, while the remainder were unemployed (MEGTW 2010, 24). The higher proportion engaged in farming is a consequence of the loss of forest for hunting and gathering after resettlement (see also section 5.2.3).

In addition to land with private title, the resettled households also received a monthly subsidy of RM 638 for a ‘stabilization’ period of 48 months. Additional compensation

¹¹This location was near the Federal Land Development Authority (FELDA) Scheme of Lurah Bilut, the first such scheme in Malaysia.

Table 2. Basic data for Sungai Temir Village and the RSLB in 2012.

Total population	381	330
Types of land title	Sungai Temir Orang Asli Reserve	Private title (as stated in land grant)
Location	Ulu Gali sub-district in Raub District, Pahang	Ulu Gali sub-district in Raub District, Pahang
Ethnic	Mainly Temuan	Mainly Temuan
Area	252 acres	600 acres
Village establishment	Twentieth century (at least by 1977)	23 January 2011
Gazetted date	20 January 1977	In process
De-gazetted date	13 May 2009 (now reverted to state land)	–
Batin	Cham anak Beng	Cham anak Beng (62 years old)
Menteri	Bedu anak An	–

Source: MEGTW (2011); oral communication, Fadzli Mat Yassis, officer SEPU Pahang, Wisma Seri Pahang, Kuantan Pahang; oral communication, Bedu An, former Menteri, Sungai Temir, 3 December 2012; oral communication, Mohamad Ainol Johari, DOA Officer, DOA Raub, 12 December 2012.



Figure 3. Newly built housing area at the Resettlement Scheme of Lurah Bilut (RSLB).
Source: Photo taken by Nor-Hisham.

for the loss of additional property was granted depending on quantity, quality, location and other criteria (MEGTW 2010). Yet when looking at the income figures, a rather bleak image appears. Over half of the survey sample (56.8 percent) self-reported a monthly income between RM 451–700 and can be categorized as poor households.¹² Those who earned

¹²For Peninsular Malaysia, poor households have been defined as earning between RM 430 and 720 (ICU 2011).

between RM 700 and 1000 represented 37.8 percent and are typified as ‘poverty-prone’.¹³ However, these income figures include the temporary ‘stabilization’ subsidy. When corrected, a significant proportion of people should actually be categorized as extremely poor.¹⁴ This is consistent with the official data for the resettlement village, which demonstrated that 39 percent were extremely poor and earning less than RM 399 while another 47 percent earned only between RM 400 and 799.¹⁵

4. Impact assessment as tokenism

In this section, we first describe the politics, key stakeholders and vested interests that led to the establishment of the KDP. Subsequently, it is ascertained how the EIA was used as an instrument to legitimize the KDP, which in its very design could only have led to the emergence of social cleavage and contestation. Lastly, it will be demonstrated that the misuse of the EIA at the federal level is reflected in actors’ aggregate perceptions of the EIA at the grassroots level.

4.1. *Politics and vested interests*

A staunch proponent for the KDP was former Prime Minister Mahathir. During his premiership, the project’s preparation and planning were finalized. Mahathir considered the project imperative for guaranteeing a continued water supply for industrialization and urbanization. At the ministerial level, the project was supported by Samy Vellu, then Minister of Public Works, who frequently appealed to the public, especially the indigenous Orang Asli, to accept the project. The KDP tender was granted to a joint venture between Japanese and Malaysian contractors.

On the Malaysian side, the KDP was awarded to United Engineers Malaysia (UEM) and Mudajaya Construction Sdn Bhd (IJM)¹⁶ as contractors. The UEM is believed to be a company associated with an important Malay ethnic political party, the United Malays National Organization (UMNO; Gomez 1994, 18). As such, it has received preferential treatment in public tendering (INSAN 1996; Gomez and Jomo 1999). Japan’s JICA also obtained advantages in tendering as it was allowed to negotiate the selection of Japanese contractors, for which the Shimizu Corp and Nishimatsu Construction Co. Ltd. were recommended (Furuoka 2008; Furuoka 2011). The Japanese contractors each obtained a 30 percent interest, thus forming a majority of 60 percent. The Malaysian contractors, the IJM Corp Bhd and the UEM, controlled the remaining balance of 40 percent, thus obtaining 20 percent each (see Figure 4).

¹³Poverty-prone households are those with a monthly income of less than RM 1000 for rural areas and less than RM 1500 for the urban areas in Peninsular Malaysia (ICU 2011). The survey determined that the remaining 5.4 percent earned an income of between RM 2001 and 2450 per month.

¹⁴The extremely poor in this area are defined as households with a monthly income of less than RM 430.00 (ICU 2011). Deducting the subsidy also implies a certain proportion of households had a negative income. This is due to the fact that the oil palm plots allocated to them were not ready for harvest as this normally takes four to six years of cultivation.

¹⁵The remaining proportions earned, respectively, between RM 840 and 1199 (eight percent) and between RM 2000 and 3000 (four percent) (MEGTW 2010, 24).

¹⁶IJM is a merger of three (3) companies, specifically, IGB Construction Sdn Bhd, Jurutama Sdn Bhd and Mudajaya Sdn Bhd. The joint-venture company was established in 1983 and is one of Malaysia’s leading conglomerates. Its core business activities encompass construction, property development, manufacturing and quarrying, infrastructure concessions, and plantations (IJM 2015).

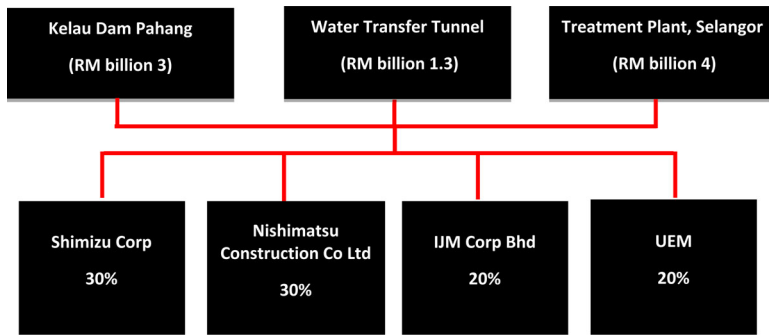


Figure 4. Division of tasks and project shares among KDP contractors.
Source: Tan (2009).

The selection of Nishimatsu created uncertainty among domestic and international observers as the company was facing a bribe investigation in Japan and had been accused of negligence while conducting business in Singapore (Ong 2009). In addition, others contended that the construction cost might not be as low as JICA claimed considering that major components had been bid for exclusively by Japanese contractors rather than through competitive bidding (Tan 2009). The Malaysian government pre-qualified three consortiums to bid for the tunnel contract, all of which were managed by Japanese contractors. Both Shimizu and Nishimatsu won the contract. It was alleged that the Japanese contractors' influence on the tender had compromised its integrity (TMI 2009).

The coordinator of the non-governmental Coalition against Water Privatization, Charles Santiago, maintained that vested interests were also instigating the federal government's rush to complete the KDP: 'The contractors cannot do their jobs because the project is funded partly by Japanese Overseas Development Aid, i.e. the Japanese government will not release the funding unless they see progress in the work' (Malaysiakini 2010b).

In a similar vein, Nicholas (2010, 117) claimed that the project was driven by the financial interests of the contractors and business persons who had cohesive connections with Japanese politicians and the UMNO. Consequently, local and international NGOs were involved in protesting against the project. For example, the Center for Orang Asli Concerns (COAC), Consumers Association of Penang (CAP), Treat Every Environment Special (TrEES), Save Our Sungai (SOS), Sahabat Alam Malaysia (SAM), and the Friends of the Earth Japan were actively staging protests and voicing criticism.

4.2 The EIA: rules versus actual assessment

In contrast to the formal rules, the Malaysian EIA system, in actuality, functions as a supplementary mechanism in environmental and land planning. Therefore, whereas the approval for the EIA is under the authority of the Department of Environment (DOE), the approval for the project is under the auspices of the 'project approving authority'.¹⁷ As a result, the DOE

¹⁷According to DOE (2009, 10), the project approving authority includes: (1) the State Development Planning Committee (SDPC) for federal government-sponsored projects; (2) the State Executive Council (EXCO) for state government-sponsored projects; (3) the various local authorities or regional development authorities with respect to planning approval within their respective areas; and (4) the Ministry of International Trade and Industry for industrial projects.

(residing under the Ministry of Natural Resources and Environment) plays only a limited role in the decision-making process (Ho 1998, 263; Chiew 2008a). Illustrative in this aspect is the remark by the Director of the DOE Pahang with regard to the Kelau Dam: 'The public should not solely blame us on every aspect of environmental problems because at times these exceed our jurisdiction' (oral communication, Ahmad Kamarulnajib Che Ibrahim, Director Pahang DOE, Kuantan Pahang, 27 June 2011).

In practice, the most influential agency is the Economic Planning Unit (EPU), which resides under the purview of the Prime Minister (at the federal level) or the Chief Minister (at the state level) (oral communication, Fadzli Mat Yassis, Officer SEPU Pahang, Wisma Seri Pahang, 3 July 2011).

The EIA in Malaysia was implemented relatively late in the planning and subsequently failed to influence project decision-making. Briffett, Obbard, and Mackee (2004, 229) also mention that information regarding land-use allocations, policy decisions on technological and socio-economic issues, and the establishment of programs is often missing. Moreover, although formally required, public participation is accorded low priority (Thanarajasingam 1992, 10; Staerdahl et al. 2004, 6 and 16) while an often-criticized aspect concerns the (unjustified) use of the Official Secrecy Act 1972 (Act 88) to withhold information. Also problematic is that the EIA procedures regulate that public participation is the prerogative of the project proponent (Nijar 1997; UNEP 1997; DOE 2009).

Considering the above information, the Malaysian EIA has been typified as a 'formality' (SAM 2007, 162–63). According to Sentian and Mohd-Tuah (2001, 75–76), local authorities' had reportedly already approved projects at the time the EIA report was just being submitted. In extreme cases, the project was even in the construction stage or had been completed upon submission of the EIA report.

The KDP obtained EIA approval in 2001, yet, indicative of the contestation over the project and the manner in which it was handled, the government was pressured by the public to conduct an additional EIA. According to Omar (2000), the inadequacy of the previous EIA study had even been acknowledged by the DOE. Noteworthy is that NGOs were only invited to offer comments on the KDP in 2002, well *after* the approval of the EIA.¹⁸ Furthermore, the indigenous population that was to be relocated, the Orang Asli, only learned about the project after it was publicized in the media and after the Land Survey and District officers arrived at the village for surveying (Imhof 2003; High Court of Malaya 2007a).

The federal state opposed the allegations and also offered counter-arguments in their defense. For instance, the High Court of Malaya commented: 'Certainly, there is no provision ... that the report must be supplied to the public and that failure to do so will nullify the whole activity' (High Court of Malaya 2007b, 10).¹⁹

According to the Chief Representative of JICA, its role was limited as it only acted 'as an observer' to the KDP. He also considered the public protests against the EIA as being based on perceptions, as he states: 'JICA does not attempt to counter back on arguments

¹⁸The invited NGOs (COAC, CAP and SOS Selangor) suspected that the meeting was merely a public relations exercise for JICA, the expected funder of the project, which was also present at the meeting (Omar 2002b). According to the COAC's coordinator, the public participation process for the KDP was driven by seeking compliance rather than genuine inputs and feedback (Collin Nicholas, oral communication, Subang Jaya, Selangor, 25 October 2011).

¹⁹In other words, the judge asserted that, despite legal recognition of public participation in the EIA, there was no provision that provided an obligation to do so.

on a “perceived” basis’. To this was added that the agency has ‘been following up on the project to ensure it has been implemented in an appropriate manner from the view of environmental and social consideration’ (Kunihiko Sato, Chief Representative JICA Malaysia, Kuala Lumpur, email interview, 9 September 2013).

Other concerns about the EIA procedure are related to how certain components had been rushed to completion. According to Omar (2000), the KDP’s fauna study was conducted over a mere two-week period, when a two-year minimum is required. Moreover, it was discovered that the flora study was performed on only a one-hectare plot; however, it must encompass a minimum of five percent of the affected area. The situation at the macro-level as analyzed here is reflected at the micro-level through our survey and interviews with the affected peasants in the resettlement area.

4.3. *Perceptions on EIA*

When we probed into the satisfaction about the EIA, the majority of the respondents (65 percent) expressed that they were not satisfied, while another portion was uncertain (16 percent). When asked for their reasons, close to half (44.4 percent, $n = 24$) stated that their feedback was not seriously considered by the government. As indicated by the Chairman of the Village Development and Security Committee (VDSC): ‘We wanted the government to honestly consult us. Treat us as a partner in the project development’ (oral communication, Esóf Chin, RSLB, 3 December 2012).

Another 22.2 percent of the respondents believed that the period for review of the EIA report was inadequate, while a similar percentage stated they did not understand the language of the report. Finally, inaccessibility to the location where the report was exhibited was also listed (7.4 percent) as well as ‘other’ reasons (3.7 percent).

Additional indication of the dissatisfaction is demonstrated by the answers to the question of whether the EIA assisted in strengthening local participation. None agreed, with 64.9 percent strongly disagreeing, 18.9 percent disagreeing and 16.2 percent expressing uncertainty. The sentiment was echoed by one of the NGOs: ‘While the EIA procedure, such as public participation, might follow basic requirements, its real intention is window dressing. There is no real public participation’ (oral communication, Shamsul Ery Shamsuddin, officer Sahabat Alam Malaysia Penang, telephone interview, 25 August 2011).

With regard to adherence to EIA procedures, 48.6 percent of respondents felt that the authorities had not complied with these procedures, with another 43.2 percent being uncertain. When we probed further into this issue ($n = 30$; see Figure 5), we found that 26.7 percent believed the EIA procedures were biased towards the project proponents, 23.3 percent felt there was manipulation in obtaining consent for relocation, and 16.7 percent maintained that public participation was limited to local leaders.²⁰

5. Temporal shifts in property rights: Orang Asli and their lands

Having ascertained how the EIA served the purpose of mere ‘tokenism’ to justify and push through the KDP, it is now time to turn to examine the impact this has had on the indigenous property rights structure. For this purpose, the shifts in institutional arrangements are analyzed at two time points by means of the FAT institutional framework.

²⁰ Another 3.3 percent stated they did not understand the EIA report due to language barriers, while the remaining 30 percent were uncertain about the specifics of non-compliance.

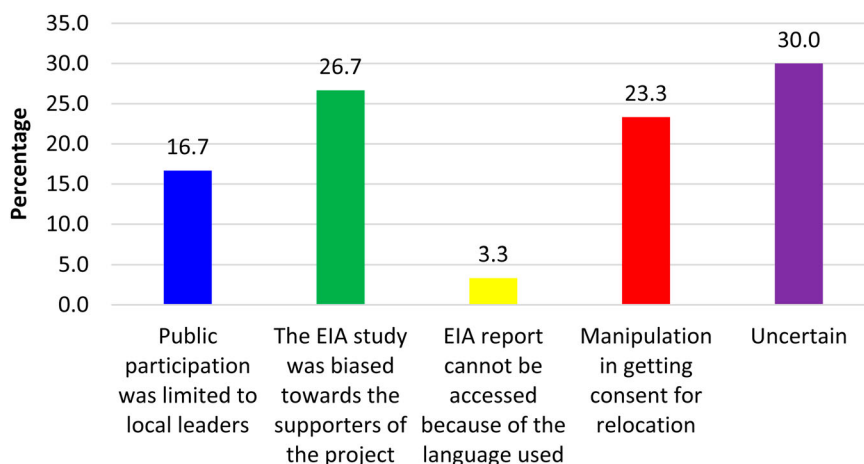


Figure 5. In what way did the government fail to comply with EIA procedures?
Source: This survey.

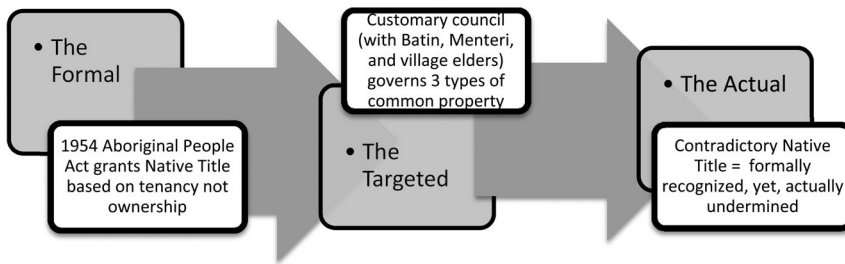
At the time prior to resettlement (t_1), it is demonstrated how the Targeted (customary and communal property rights), from the perspective of the indigenous Orang Asli, is increasingly undermined by the Formal (native title, as incorporated in federal law). This has led to a contradictory Actual property rights structure in which indigenous lands are formally recognized, yet actually weakened, due to the status of the indigenous people as tenant rather than landlord. It is important to note that, in analyzing the institutional arrangements at the second point in time (t_2 – that is, the time after resettlement), a shift in analytical perspective occurs. Whereas at t_1 the Formal was represented by native title, the Targeted by the Orang Asli's customary praxis and the Actual by a contradictory rights structure, this changes during and after resettlement. Stated differently, it is now demonstrated how the formal expropriation invalidated the Orang Asli's targeted native title, giving way to the emergence of an actual private property regime that lacks sufficient credibility, as depicted in Figure 6.

5.1. *Before resettlement*

5.1.1. *The Targeted*

Prior to Malaysia's independence from the British in 1957, the Orang Asli area was named 'Sakai Reservation' (Toshihiro 2009, 24). Legally speaking, it was unclaimed even though it was used and regarded by the aboriginal people as their own. The indigenous areas lacked formal title and existed by the sufferance of traditional Malay rulers (Nicholas, Engi, and Teh 2010, 39–40). Currently, at the village level, the Orang Asli have still retained elements of their customary land institutions. The 'Batin' (headman), assisted by one or two 'Menteri' (ministers) and a Customary Council of Elders, is responsible for land matters. Their tasks include granting approval for clearing and cultivating forest, enforcing rules on land use, and controlling and transferring rights within the community. In addition, they have the authority to settle land disputes (oral communication, Cham Beng, Batin, RSLB, 24 November 2012). However, unlike other indigenous peoples such as the Orang Ulu in Sarawak, the Orang Asli have no native court system (Nicholas 2010).

T₁: situation prior to resettlement on January 2011



T₂: situation after resettlement

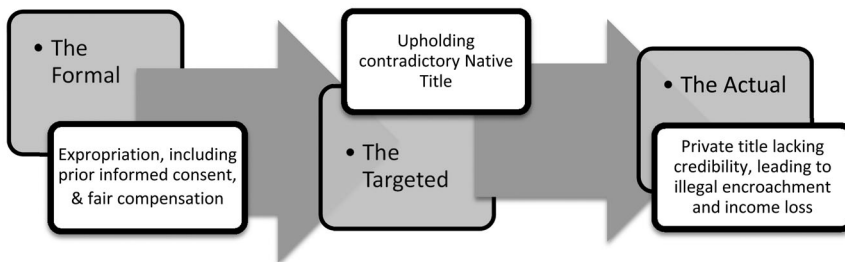


Figure 6. The FAT institutional framework applied to the Kelau Dam case.
Source: Illustrated by Ho.

The Orang Asli's indigenous land in Pahang State is divided into three categories, specifically: (1) 'active', productive land that is being cultivated; (2) 'inactive' land (or *Rang*) which is temporarily left fallow to regain fertility; (3) communal, foraging and hunting grounds where products for communal use such as medicine, rattan, herbs, wood and house materials, and those also used for activities like hunting and fishing can be collected. These land types are considered ancestral lands.

5.1.2. The formal

In the post-colonial period, the 1954 Aboriginal People Act was and still is applied to the Orang Asli in Peninsular Malaysia. The Act empowers the state to declare an area to be an Aboriginal Reserve formally supported by 'native title' (GOM 2006c, 8). Native title is a collective right whereby the entire community holds the responsibility for decisions regarding the land. Through proclamation in the state gazette by the Federal Minister, Orang Asli land is designated as an indigenous reserve. However, the deficiency of the Aboriginal People's Act lies in Section 8(2c) which does not consider the Orang Asli the landlord or owner but only a 'tenant-at-will' (GOM 1997; Hamid, Harun, and Syed-Nang-Mohamad 2011). Moreover, whereas the Act recognizes the need for compensating crops (Section 12) in the event of expropriation, the same Act paradoxically fails to compensate for the acquisition of the reserves (Section 11). The rationale is the Orang Asli's status as tenant instead of as landlord. The status is further undermined as the Act empowers the Federal Minister to entirely or partially revoke the declared Aboriginal Reserve (Sections 6(3) and 7(3)).

5.1.3. *The Actual*

Despite the increase in the federal recognition of Orang Asli reserves between 1990 and 2010, this is not reflected at the local level. The formally recognized 132,946.64 hectares of Orang Asli lands in Peninsular Malaysia only represents 17 percent of the lands actually claimed by the Orang Asli (HRCM 2013, 133). The Federal Department of Orang Asli Affairs is generally considered to be failing in its protection of indigenous interests (HRCM 2013, 134), which has also led to resentment among the Orang Asli (CAP 2000). Projects and development for large-scale plantations, mining and agri-business have been identified as driving factors behind the land loss and, in fact, are a frequent source of land disputes between the government and indigenous people (Ngidang 2005). In this context, nation-wide disputes over land rights between indigenous communities vis-à-vis third parties, including the state and state-owned corporations, have markedly increased over the years. The number of formal complaints per year received by the Human Rights Commission of Malaysia since its establishment in 2007 has increased from 94 to 207 in 2011, totaling a number of 642 cases.²¹

5.2. *After resettlement*

Prior to resettlement, the actual property rights enjoyed by the indigenous population consisted of a contradictory set of rights, which although undermined, by and large still ensured customary access to communal forests, hunting grounds and cropland (under shifting cultivation, popularly known as ‘slash-and-burn’). Despite this contradictory, undermined nature, native title is still preferred by a majority of the respondents and, as we will see below, regarded as better than the EIA-legitimized private title after resettlement. In this sense, native title becomes a ‘Targeted’ property right. However, because of its weakened nature, native title provided little protection against the ‘Formal’, an expropriation, which gave way to the ‘Actual’: private title to cropland *without* possibilities for hunting and gathering as previously practiced.

As the survey sample reflects, the supposition of native title with a private property regime led to an increase rather than a decrease in the proportion of villagers dependent on farming and land. Most respondents had a negative perception of the impact of the relocation on land tenure which can be divided, in effect, due to the loss of: (1) ‘active’ land, i.e., cropland under current use; (2) ‘inactive’ *Rang* land temporarily left fallow to regain fertility; and (3) the Orang Asli’s communal, foraging and hunting grounds. The survey concentrated on respondents’ perceptions in three categories: (1) the land expropriation procedure; (2) native title as a land policy; and (3) the impact of the loss of native title on livelihood.

5.2.1. *The Targeted: native title*

As can be determined from Table 3 below, the majority of respondents (97.3 percent) ‘strongly agreed’ that the policy of communal native title was important to them. To the question of whether ‘the government’ adequately protected native title, over half (51.3 percent) disagreed (including 10.8 percent strongly disagreeing), whereas 48.7 percent were uncertain. None of the respondents agreed or strongly agreed. The sentiment turned

²¹As of 14 October 2011, there were 249 court cases in the Malaysian High and Appeal Courts concerning various issues of land disputes. The figures were based on LexisNexis Malaysia, a search engine that, among others, provides a database of court cases. However, the figure does not include cases in the Lower Courts.

Table 3. Views on private and native title (NT).

	Strongly agree	Agree	Uncertain	Disagree	Strongly disagree	Total
Is NT important to the indigenous people?	97.3	0	0	0	2.7	100.0
Does the government adequately protect the NT?	0	0	48.7	40.5	10.8	100.0
Do government policies and laws adequately protect NT?	2.7	0	21.6	64.9	10.8	100.0
Was termination of the NT acceptable?	2.7	2.7	2.7	16.2	75.7	100.0
Does the current private title give better benefits than the previous NT?	0	0	13.5	73.0	13.5	100.0
Did you receive a clear notice for the NT termination?	0	78.4	16.2	5.4	0	100.0
Did you receive adequate notice for the land termination?	2.7	35.1	29.7	24.4	8.1	100.0
Was your land under NT properly surveyed?	0	35.1	21.6	37.9	5.4	100.0

Source: This survey.

even more negative when the question was rephrased in neutral wording of whether ‘policies and laws’ adequately protected the native title.²² In this case, 75.7 percent disagreed (including 10.8 strongly disagreeing) with an additional 21.6 percent being uncertain. Subsequently, respondents were asked whether they believed that the termination of the native title was acceptable, whereby the overall majority strongly disagreed (74.5 percent) or disagreed (17.4 percent).

5.2.2. *The formal: the expropriation*

The survey included questions on villagers’ perceptions towards the expropriation procedure. On a slightly positive note, it was ascertained that the majority (78.4 percent) agreed that there was an unambiguous notice for the termination of the native title, with 16.2 percent being uncertain and 5.4 percent disagreeing. Of the respondents, 37.8 percent agreed (including 2.7 percent strongly) that the notice period was adequate, although an almost equal percentage (32.5 percent, including 8.1 percent strongly) disagreed while the remaining one third (29.7 percent) were uncertain. Close to half disagreed (43.3 percent, including 5.4 percent strongly) that their land under native title had been properly surveyed (see Table 3).

The survey also examined the respondents’ opinions regarding compensation. It was found that the overall majority (or 64.9 percent) disagreed that the received compensation was fair.²³ Those respondents ($n = 24$) were then asked to state their reasons for

²²In this regard, an NGO representative noted: ‘The government does not recognize our land. How many Orang Asli villages have received [land] grants? Instead, the government saw our customary land as a halt to development’ (oral communication, Yusri Ahong, Committee Member of Jaringan Kampung Orang Asli Semenanjung Malaysia or JKOSAM, Temerloh Pahang, 3 December 2012).

²³The remaining percentage agreed.

dissatisfaction (more than one answer was possible). The reasons were ranked as follows: in first place, the allocated land is insufficient (33.8 percent); followed by discontent over the formula used to calculate the compensation (31.0 percent); then, uncertainty over the employed surveying method (23.0 percent); and, finally, the remote location of the newly built house from the allocated agricultural plot (11.3 percent).

The villagers were then asked whether they had been informed about the compensation formula and whether they understood it. To the first question, 54.1 percent stated they were informed about the compensation formula, compared to 43.2 percent maintaining that they had not been informed and 2.7 percent being uncertain. Striking is the fact that 75.8 percent indicated that they did not understand the formula, with another 16.2 percent feeling uncertain about it.

Lastly, the survey also examined the issue of voluntary consent. In this regard, 54.1 percent of the respondents admitted that they had not consented voluntarily to the displacement while another 10.8 percent was uncertain. It is noteworthy that some felt that the Batin or headman was loyal to the government in regard to the relocation while the community was actually against it (oral communication, Yusri Ahon, Committee Member, Jaringan Kampung Orang Asli Semenanjung Malaysia²⁴ and Deputy President, Association of Indigenous People's Network of Peninsular Malaysia, Temerloh Pahang, 3 December 2012).²⁵ One villager commented:

Our Batin is illiterate and can be easily manipulated. Batin Cham is the only representative we had for the project. He is a good leader but when dealing with the government, he always says yes without discussing with us first. (oral communication, Aziz Bedu, Sungai Temir Village, 3 December 2012)

5.2.3. *The Actual: private property and loss of native title*

The final section of the survey examined respondents' opinions on the manner in which the expropriation of native title had affected livelihood. A total of 94.6 percent agreed (including 81.1 percent strongly) that the KDP had reduced food resources due to the absence of hunting and food gathering grounds at the RSLB.²⁶ One of the resettled peasants described his predicament:

We no longer have a hunting and gathering area. I cannot simply gather and pluck ferns here, because that area belongs to the FELDA's people [Federal Land Development Authority, a scheme for other resettled peasants]. ... Sometimes, my wife and I go back to Sungai Temir to collect fern or other forest products because it is abundant there. (oral communication, Ali Sanggul, resettled farmer, RSLB, 25 September 2012)²⁷

²⁴This NGO, abbreviated JKOSAM, is a grassroots Orang Asli non-governmental group. It was established in 2009 and has frequently opposed government policy on giving private land ownership for customary, Orang Asli land.

²⁵Abbreviated as JOAS, which is a coalition of 21 NGOs in Malaysia that aims to advocate indigenous people's rights. It was established in 1993 (Orangasalblogpot 2013).

²⁶Only 2.7 percent disagreed, and 2.7 percent were uncertain.

²⁷The situation is also reflected in the court affidavit by Bedu anak Nan, 7 October 2007, addressed to the High Court of Malaya. In it, it was highlighted that the Lakum Forest Reserve and Bukit Lanchar Area were free resource areas for the Orang Asli for them to obtain forest products such as rattan and other high quality trees, e.g., '*gaharu*' (High Court of Malaya 2007a, point 11).

Another crucial impact of the delegitimization of native title is its impact on the customary praxis of shifting cultivation. After resettlement, each household was only entitled to six acres per family. With no access to communal forest areas, shifting cultivation could no longer be practiced. In this context, 81.1 percent agreed (including 29.7 percent strongly) that one of the negative impacts of the KDP was the impossibility of shifting cultivation in the resettlement scheme.²⁸

Moreover, 91.9 percent of the respondents agreed (of which 62.2 percent strongly agreed) that the six acres of land offered as compensation was insufficient to account for future, demographic change.²⁹ As the chairman of the VDSC stated: 'After being resettled at the RSLB for about two years, there are already about 20 new households who do not have land and houses. How many more after 20 or 30 years of living here? (oral communication, Esóf Chin, RSLB, 3 December 2012).

In fact, compared to the landless peasants resettled in the same area under the FELDA scheme who, unlike the Orang Asli, did not previously possess any land, the compensation for the loss of cropland was substantially less.³⁰

Nearly all respondents agreed (94.6 percent, of which 81.1 percent strongly agreed) that household income had been negatively affected by the limited cropland at the RSLB.³¹ As a result, many peasants had no other recourse in maintaining livelihood than to illegally encroach into the neighboring Semantan State Forest Reserve (see Figure 7). In fact, 94.6 percent agreed (including 35.1 percent strongly) that illegal encroachment was caused by the insufficient size of the allocated private plots. Interestingly, 86.5 percent of respondents disagreed (including 13.5 percent strongly disagreeing) that the private title in the RSLB provided better benefits than the communal native title.

It should be noted that the KDP's EIA had advised allowing the Orang Asli to continue gathering and selling forest products as a means to improve their income; however, this warning was disregarded by the project-approving authorities (MOW 2003, 7–4).

The resettlement has had a significant impact on the Orang Asli's customary institutions. Communal ownership has been supplanted by private property rights whereas the previous authority of the Batin, the Menteri and the Customary Council of Elders in land governance has been superseded by the District and Land Office. In fact, the position of the Menteri had completely been abolished. Considering this, 91.9 percent of the respondents (including 40.5 percent strongly) agreed that private title had undermined the power and rights of the Customary Elderly Council at the resettlement scheme.³² One of the local leaders described the situation:

Before we moved here, the Elderly Council had authority over land matters. We could settle land disputes amongst ourselves, we could pass down our land to our children without title. Now everything must go through government officials. People feel that the Council has no role anymore. (oral communication, Esóf Chin, Chairman VDSC, RSLB, 3 December 2012)

The resettlement has entailed a significant change in villagers' engagement in agriculture (more specifically, towards commodified oil-palm cultivation). In this regard, it was

²⁸Among these, 2.7 percent disagreed and 16 percent were uncertain.

²⁹A total of 8.1 percent were uncertain.

³⁰The FELDA peasants received 8–10 acres of land as compared to the six acres for the Orang Asli (oral communication, Collin Nicholas, Coordinator COAC, Subang Jaya, 25 October 2011).

³¹Only one percent strongly disagreed, and 2.7 percent were uncertain.

³²To this question, 2.7 percent disagreed, and 5.4 percent were uncertain.



Figure 7. Semantan State Forest Reserve, now illegally encroached upon by the Orang Asli.
Source: Photo taken by Nor-Hisham.

important to learn their perceptions with regard to vocational training. This was all the more critical as the EIA had previously revealed that only 63.9 percent of the households in Sungai Temir have adequate (modern) agricultural skills. The study also ascertained that the households lacked skills in many other fields as well (MOW 2003, 4–12). Despite this situation, the survey showed that 67.6 percent of the respondents believed that they had not received appropriate training. When further prompted to indicate what type of training was necessary (more than one answer was possible; $n = 29$), the great majority (82.8 percent) stated agricultural training, followed at a significant distance by handicraft (6.9 percent); and equally distributed were aquaculture, sewing and decoration, and others (with 3.4 percent each).

6. Development intervention: when halting, when moving?

The case study on the Kelau Dam has painfully demonstrated that development projects and impact assessments, which need to mitigate and minimize their effects, are difficult to enforce *exogenously*, as they are inevitably drawn into a larger *endogenous* ‘game’ between different actors. This is why numerous studies point to implementation problems and have questioned the discourse behind the use and even the establishment of such guidelines. This holds regardless of whether we look at issues of environmental impact (e.g., Bartlett and Kurian 1999), social impact (Mathur, 2011), the impact of mining (Ownen and Kemp, 2015), Olympic parks (Müller 2015) or dams (Scudder, 2005). In an attempt to increase the efficiency and credibility of development interventions, solutions have often been pursued through assessment procedures that are more detailed, transparent or comprehensive (e.g., Fernandes 2000; Tenney, Kværner, and Gjerstad 2006).

Contrarily, we maintain that it is crucial to consider the function of institutions. When projects involve the resettlement of communities this question critically involves the consideration of land as a means of social welfare instead of a commodity, not least in a

developing, agrarian context (Charlesworth 1983; Ilbery 1984; Guhan 1994). What is needed is to guarantee that measures are in place to ensure social welfare and alternative employment of the targeted community. If projects are imposed without these, a dual outcome is certain: (1) a lack of credibility of the intervention; and (2) the prevalence of political-economic interests over social, health and environmental interests. As the Introduction in this collection to Ho (2016, 1141) notes:

[O]rdaining and prohibiting belong to a mode of institutional intervention that will only work when the function of what is intended already concurs with what locally exists as actors' aggregate perceptions. Ironically, ... governments often chose ordaining and prohibition in a symbolic demonstration of resolve or to strike deals with other powerholders. The outcome is a contested institution lacking credibility, or an empty institution decoupled from actors' daily praxis.

As a critical addition to the impact assessment, this contribution contends that a major step towards better management of the adverse impacts of development-induced displacement and resettlement lies in the identification of certain 'no-go-areas'. Or, as Miranda, Chambers, and Coumans (2005, 11) duly noted in a report on mining:

[S]ome places ... may be so environmentally or socially sensitive that the risks posed by development in these areas are too high. Such areas, generally referred to as 'no go' zones, can include socio-cultural as well as environmentally valuable areas.

At this point, it needs noting that this paper does not argue *against* impact assessment, nor does it argue for the preservation of the status quo as an 'ever-preferred' option over development. In contrast, it emphasizes the conditions under which a developmental intervention can progress inasmuch as it highlights the situation when it is wisest to disregard the impact assessment and the development intervention for which its assessment is requested. In this respect, a 'conditional trinity' must be considered prior to even performing the impact assessment, let alone the project:

- (1) Is the existing function of institutions crucial for local livelihood?
- (2) Does the implementing agency disregard institutional function?
- (3) Do power divides between targeted community and implementing agency prevent participation by the former?

If the aforementioned questions are answered affirmatively, the impact assessment – be it to evaluate the effects on the environment, society or health – runs a substantial risk of serving as a façade of rationality and positivism to legitimize something different. As Bravante and Holden (2009, 523) stated, it becomes 'a tokenism designed to make it appear that ... projects are being assessed for their environmental effects while they receive their inevitable predetermined approval'. Let us review how the three conditions work out in the case of the Kelau Dam.

6.1. Institutional function

For one, in the case of the Orang Asli, the customary property rights existed to ensure that farm households had sufficient land to survive: 'active' cropland under current cultivation; temporarily untilled *Rang* land; and communal forest for hunting and gathering. The Orang Asli community was heavily land-dependent, with few alternative employment opportunities beyond agriculture. According to official figures, 55 percent were engaged in their

own farm with another 41 percent working as hired labor at other farms or being active in the petty trade of forest products, while the remainder were unemployed. These figures were confirmed by the survey. In this context, the Orang Asli's customary rights arrangements endogenously emerged to cater for livelihood, not in response to a market. Differently worded, these institutions fulfill a function in social security rather than catering for economic transactions. Their institutional form, by and large informal and communal, is derived from that function.

6.2. *Disregard*

The function of land as social welfare features prominently in developing contexts (Guhan 1994; Davy, Davy, and Leisering 2013), yet is often neglected. The federal Malaysian government demonstrated limited interest in catering for the social welfare function of land or acknowledging its existence. There was no prior planning or preparation to adequately compensate the loss of the Orang Asli's communal grounds for shifting cultivation or for hunting and gathering. Even worse, these were supplanted by a private property regime based on cash crops targeting a market for which the Orang Asli were ill prepared in terms of training and skills. With a low-educated population fully dependent on subsistence agriculture, hunting and gathering, or being unemployed – thus, representing a substantive surplus labor – one may seriously question the viability of an externally engineered, commercial agriculture based on private property.

This disregard of the endogenously grown function of land for the Orang Asli is markedly reflected in the survey findings. Distributed over three separate questions, it was found that for each question, over 90 percent of the respondents agreed:

- (1) That food resources had been reduced due to the absence of hunting and gathering grounds in the resettlement area;
- (2) That the cropland offered as compensation was insufficient to account for future, demographic change; and, finally,
- (3) That household income had been negatively affected by the limited cropland.

6.3. *Power and participation*

This contribution is evidently addressing a substantial power divide between the target population versus the agencies responsible for implementation. Nationwide, the Orang Asli constitute just over 0.6 percent of the country's population while featuring a high poverty rate with approximately 32 percent of them being categorized as poor or extremely poor (EPU 2011; DOA 2012). In the specific case of the Kelau Dam, the divergence in power and resources could not be any greater than that between those targeted and the implementers: a small village of around 380 indigenous peasants pitted against the federal Malaysian state. On top of this, the traditional practices of slash-and-burn and hunting-and-gathering have little economic interest to the state.

In the face of such a power divide, any call for participation is purely symbolic as the targeted population simply lacks the means, capability and resources to do so. The survey results are telling. None of the respondents agreed that the EIA strengthened local participation, with an overwhelming majority stating that they strongly disagreed. Well over half of them maintained they had not consented voluntarily to the resettlement, with an additional one tenth being 'uncertain'. In this context, the Orang Asli did not have much

choice other than to incorporate the ‘weapons of the weak’ (Scott 1985). Following the relocation, there have been frequent reports about illegal encroachment into the neighboring Semantan State Forest Reserve. Again, the survey revealed that over 90 percent agreed that this resulted from insufficient cropland at the resettlement scheme.

To what extent can the findings provide validity to the hypothesis that the conditional trinity of function, its disregard, and power divides preventing participation provide a ‘no-go’ for development interventions, in general, and regarding the EIA and Kelau Dam in particular? The case study on the Kelau Dam does not provide a ‘counter-factual’. Having said this, although it represents an open trial rather than a blinded experiment, it does concur with the findings of other research at different levels. Within and outside Malaysia, there is a wealth of studies that pinpoint the problems associated with development-induced displacement, ranging from dams to mining, Olympic parks and plantations (Alias, Kamaruz-zaman, and Daud 2010; Isaacman and Isaacman 2013; Ownen and Kemp, 2015; Müller 2015; Verhoeven 2016). Equally, with regard to the impact assessment, numerous studies have found that it is exploited by agreeing with sustainability and social acceptability but doing little to help them to succeed, while pushing through projects with significant vested interests (Memon 2000; Sentian and Mohd-Tuah 2001; Bravante and Holden 2009; Chikkatur, Sagar, and Sankar 2009).

In the course of modernization and development, agrarian and indigenous communities are inevitably drawn into processes that may well herald their end. To ensure that such processes occur in a more equitable and socially acceptable manner, there might be much less to gain from a further bureaucratization, diversifying or specialization of impact assessments regardless of whether the discussion is concerning an environmental, social, biodiversity, mining or hydropower sustainability assessment. Such bureaucratization and specialization obfuscates rather than illuminates and could facilitate the justification of institutional interventions that essentially should never have been implemented. Instead, it might be more insightful to directly distinguish the basic conditions under which neither the impact assessment nor the project or program for which it is commissioned should move forward. Therefore, perhaps the more important lesson to be drawn from this case study is that, when a previously described conditional trinity of function, disregard and participation undermined by power converges, development practitioners and assessors should be sensitive to not providing legitimacy for programs and projects that would best be halted.

Lists of abbreviations

CAP:	Consumers Association of Penang
COAC:	Center for Orang Asli Concerns
DIDR:	Development-Induced Displacement and Resettlement
DOA:	Department of Orang Asli
DOE:	Department of Environment
DOIC:	Department of Information and Communication Sarawak
EIA:	environmental impact assessment
EPU:	Economic Planning Unit
EXCO:	State Executive Council
FELDA:	Federal Land Development Authority
GOM:	Government of Malaysia
HRCM:	Human Rights Commission of Malaysia
ICU:	Implementation Coordination Unit
IJM:	Mudajaya Construction Sdn Bhd
JICA:	Japan International Cooperation Agency

KDP:	Kelau Dam Project
MEGTW:	Ministry of Energy, Green Technology and Water
MOW:	Ministry of Public Works
MRCB:	Malaysian Resources Corp Bhd
NGO:	non-governmental organization
NT:	native title
RSLB:	Resettlement Scheme of Lurah Bilut
SAM:	Sahabat Alam Malaysia
SOS:	Save Our Sungai
SPDC:	State Development Planning Committee
TMI:	The Malaysian Insider
TrEES:	Treat Every Environment Special
UEM:	United Engineer Malaysia
UMNO:	United Malays National Organisation
UNEP:	United Nations Environment Program
VDSC:	Village Development and Security Committee

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Appendix

Table A1. The Orang Ulu respondents' profile.

Gender	Number	Percentage of total
Male	35	94.6
Female	2	5.4
Total	37	100.0
Age cohort	Number	Percentage of total
18–30 years	8	21.6
31–40 years	3	8.1
41–50 years	5	13.5
51–60 years	11	29.7
61–70 years	10	21.1
Total	37	100.0
Education	Number	Percentage of total
College	2	5.4
High school	12	32.4
Junior high school	11	29.7
No formal education	12	32.4
Total	37	100.0
Current occupation	Number	Percentage of total
Professional and administrative	0	0.0
Clerical	0	0.0
Farmer	32	86.5
Others	5	13.5
Total	37	100.0
Household size	Number	Percentage of total
≤3	9	24.3
4–5	20	54.1
≥6	8	21.6
Total	37	100.0
Monthly income ^a	Number	Percentage of total
RM 451.00–700.00	21	56.8
RM 701.00–1000.00	14	37.8
RM 2001.00–2450.00	2	5.4
Total	37	100.0

Source: This survey.

Notes: ^aDuring the fieldwork period in 2012, the currency exchange between the Malaysian Ringgit and the US dollar was around RM 0.32 to 1 USD.

List of interviewees

- Ahon, Y., a Committee Member of the JAKOSAM cum Deputy President 3 of the JOAS, in Temerloh Pahang on 3 December 2012
- An, B., a former 'Menteri', at Sungai Temir Village on 3 December 2012
- Azit, R., Project Assistant Director, in Kelau, Raub Pahang on 18 August 2011
- Bedu, A., at Sungai Temir Village on 3 December 2012
- Beng, C., a Batin, at the RSLB on 24 November 2012
- Che-Ibrahim. A.K., Director of the Pahang's DOE, in Kuantan Pahang on 27 June 2011
- Chin, E., Chairman of the VDSC, at the RSLB on 3 December 2012
- Ery-Shamsuddin, S., an officer from the SAM Penang, on 25 August 2011
- Johari, M.A., a DOA Officer from the Raub District, at DOA Raub on 12 December 2012
- Mat-Yassis, F., an Officer from the SEPU Pahang, at the Wisma Seri Pahang, Kuantan Pahang on 3 July 2011
- Nicholas, C., a Coordinator for the COAC in Subang Jaya, Selangor on 25 October 2011
- Sanggul, A., a resettler, at the RSLB on 25 September 2012
- Sato, K., Chief Representative of the JICA Malaysia, in Kuala Lumpur on 9 September 2013

List of interviewed organizations

- Association of the Orang Asal Network Peninsular Malaysia (JOAS)
- Borneo Research Institute (BRIMAS)
- Centre for Orang Asli Concerns (COAC)
- Consumers Association of Penang (CAP), Malaysia
- Department of Environment (DOE) of Kuala Lumpur
- Department of Environment (DOE) of Putrajaya (HQ)
- Department Of Orang Asli (DOA), Raub Pahang
- Economic Planning Unit (EPU), Prime Minister's Department
- Japanese International Cooperation Agency (JICA), Kuala Lumpur
- Jaringan Kampung Orang Asli Semenanjung Malaysia (JKOSAM)
- Ministry of Energy, Green Technology and Water (MEGTW)
- Natural Resources and Environmental Board (NREB)
- Sahabat Alam Malaysia (SAM), Penang
- Sahabat Alam Malaysia (SAM), Sarawak
- Sarawak Hydro Berhad
- Sarawak Economic Planning Unit, Kuching Sarawak
- Shitmitzu-Nishimatsu
- State Economy Planing Unit (SEPU) Pahang
- Village Council and Security of Resettlement Scheme of Lurah Bilut, Pahang