Compensation for Orang Asli native land in Malaysia: The perceptions and challenges in its quantification

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Abstract

This paper describes the results of an investigation on the challenges confronting valuers in dealing with the assessment of compensation for Orang Asli native land (OANL). In Malaysia, valuers are often ambivalent about assessing the worth of Orang Asli property rights; this is because the conventional valuation toolkits are 'ill-equipped' to cope with the multi-faceted issues involved in valuing such lands. Orang Asli view the worth of their lands from a multitude of dimensions (spiritual, cultural, communal and economic), and this often takes the value consideration far beyond that contemplated by private registered land owners. The study also looks into the compensation for native titles in other countries and draws local parallel to the problem. The key issues that have been identified include the valuation approaches; land rights; monetary and non-monetary compensation; legal framework and; negotiation for compensation. These lead to the recommendation that the compensation issue for Orang Asli native land is need of a legislative reform.

Keywords: *Acquisition, Orang Asli land rights, compensation, challenges, valuation approaches*

Introduction

The purpose of this paper is to report the results of a preliminary survey that has been undertaken to elicit perceptions among the various groups involved in determining the compensation for Orang Asli native land. The valuation of compensation for the partial or total extinguishment of Orang Asli (the Malay term for the indigenous peoples in Peninsular Malaysia) property rights represents a grey area in valuation practice in Malaysia.

The issues with regard to the assessment of compensation for Orang Asli native land concern the interests of such land, which confer differing level of rights from the ones enjoyed by a titled land. These interests are even lesser than the interests conferred to a group settlement grant by the Land (Group Settlement Areas) Act 1960 in which the rights, although impaired, are not totally extinguished. Neither do these interests exist under the traditional laws and customs (Nik Yusof, 1996; Jafry, 1996). Therefore, it is necessary to establish the Orang Asli land rights as highlighted in Adong Kuwau (1997) and Sagong Tasi (2002) as well as native title rights as emphasised in The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors (Wik, 1993).

There are precedents relating to the compulsory acquisition of, and compensation for, lesser interests in land. The Spencer principle remains applicable whereby compensation is assessed on

the basis of the amount a willing buyer would pay a willing seller for the interest (Spencer v Commonwealth (1907) 5 CLR 418). There are examples of courts assessing compensation involving loss of leases, easements, licences, riparian rights, fishing rights and even the right to dig for worms for bait (Gobbo, 1993). Similarly, the courts developed methods for valuing lesser native title interests under the Native Title Act 1993 (Australia) (Smith, 2001). These would provide useful references for valuing Orang Asli native land in Malaysia for compensation purpose.

This paper is divided into three parts. In Part I, we review the rights and interests attached to Orang Asli of their native land. In Part II, we look at existing frameworks in the compensation of Orang Asli native land together with a review of the current framework for the valuation of OANL. In Part III, we present the results of a preliminary survey.

The Key Issues

Current laws in Malaysia leave many issues open when it comes to assessing the worth of Orang Asli property rights. The specific details remain to be worked out between parties involved in negotiation[1]. With regard to the compensation for Orang Asli native land affected by an acquisition, there is considerable uncertainty surrounding the following key issues:

- What are the Orang Asli land rights and interests that have been, or might be affected by an acquisition exercise by the state authority?
- What is the nature of the impact on Orang Asli land rights and interests?
- How are losses, impairments or extinguishments to be determined?
- Who is entitled to compensation and on what basis?
- How to distribute the compensation for Orang Asli Reserves or Areas?
- How is the extent of compensation to be measured?
- Is there a need for legislative reform to address the problems?

Opinions have been expressed by various quarters on the issues and proposed solutions mostly come from legal and land valuation discourses, which are often pursued within highly charged contexts of resource development or court litigation[2] (Gardner, 1998; Sheehan, 1997, 1998; Nicholas, 1997). Not surprisingly, many parties are looking for the elusive formula or standardised procedure for the calculation of compensation.

Rights and Interests of Orang Asli Native Lands

Precisely what rights and interests do Orang Asli have over their native lands? The position differs between what is given in statute and what exists under common law.

Land Ownership

Orang Asli regard *saka* or traditional rights to specific ecological niches as owned communally by them from the time of their ancestors, and these rights will continue to the following generations (Nik Yusof, 1996). Historically, their claims to these areas were to a large extent not contested by other communities because these areas were invariably regarded as uninhabitable, remote and backward (in fact, it was not so much the lands that were coveted by others but rather the resources found therein). Given that the exploitation of forest resources (such as *gaharu*, resins, rattan, and petai) had formed the means

[1] Parties involved are: Department of Aboriginal Affairs (JHEOA), the State Authority, the Acquiring Body and valuers

[2] See also Sagong Tasi v The Selangor State Government [2002] 2 MLJ 591; Adong bin Kuwau and Nors v Kerajaan Negeri Johor and Anor [1997] 1 MLJ 418

by which they sustained their livelihood, the Orang Asli had since 1400s found themselves being exploited by outsiders for the extraction of the forest produce (Nicholas, 2003).

This scenario however changed when Malay Rulers arrived to stake claim and assume ownership of all lands lying within their claimed domain, thereby 'colonising' the territories of the Orang Asli. The introduction of the Torrens System of land ownership during British colonial rule later on exacerbated this situation (Nik Yusof, 1996; Awang, 1996). Nonetheless, the Orang Asli did not lose their traditional lands entirely during these periods. In fact, some territories gained official recognition during the later part of the British colonial rule (particularly in the 1930s and 1950s) when they were gazetted as Orang Asli reserves; some others were recognised as Orang Asli areas or Orang Asli 'sanctuary'. None of these were conferred legal territorial ownership to the Orang Asli. Even the more recent Aboriginal Peoples Act (Act 134, 1954 revised 1974) fell short of granting the full recognition to land rights with its declaration of Orang Asli merely as tenants-at-will.

Recent years have seen several established Orang Asli settlements having to make way for major development projects such as the Kuala Lumpur International Airport (KLIA), highways, private university, dams, golf courses, and for private housing and industrial projects. In standing for their rights, the Orang Asli resorted to various means for remedies, including to the courts of law. They met with some measure of success in forcing the State to recognise their traditional or *saka* rights. In Koperasi Kijang Mas v Kerajaan Negeri Perak & Ors (1991), for example, the High Court ruled that irrespective of whether or not an area had been gazetted as an Orang Asli reserve, as long as that area was identified as an Orang Asli area or an Orang Asli inhabited area, all resources in it, including timber, vest with the Orang Asli community there.

Six years later, in Adong Kuwau (1997) case the court ruled that the state authority must compensate the Orang Asli for the loss of income if, as a result of the acquisition, the Orang Asli were no longer able to subsist on the bounty of their traditional resource. In this particular case, the Orang Asli community was awarded for a 25-year period loss of income amounting to a total of RM38 million in monetary compensation.

Five years later (in 2002) in yet another landmark decision, the court in *Sagong Tasi & Ors v. Selangor State Government & Ors (2002)*, the court ruled that although the affected lands were not gazetted as an Orang Asli reserve or were untitled, those traditional territories where the community had lived and worked upon in accordance with their 'adat' or custom are to be considered as having been accorded the same rights as that of a titled land and, as such, the law that applies elsewhere for acquisition should equally apply to the holders of the traditional lands.

Tenant-at-Will

The extent of the Orang Asli rights over their traditional lands is spelt out in the Aboriginal Peoples Act, 1954. In essence, the Act provides for the establishment of Orang Asli areas and Orang Asli reserves. Previously, the view of the government was that under the Aboriginal Peoples Act, 1954 the best interest the Orang Asli may obtain from their traditional lands is as a tenant-at-will. This was due to the perception that the traditional lands of the Orang Asli in principle are state lands (Endicott & Dentan, 2004; Jamaluddin, 1997; Salleh, 1990; Idris, 1983). The Orang Asli was considered to occupy their traditional lands as 'guests' of the government. As such, when the land is needed for any reasons, the government would just revoke the status of these traditional lands

and issue to the affected Orang Asli a short notice to vacate their traditional lands; this is notwithstanding the fact that the Orang Asli and their families may have been occupying the land for generations. The Orang Asli are then required to vacate these lands within a stipulated period or be evicted otherwise. This is evident in the state of Selangor, as in Sagong bin Tasi (2002) case.

Apart from being summarily evicted, the Orang Asli is not paid any form of compensation for the loss of their traditional lands. Instead, the Orang Asli is compensated purely based on Sections 11 and 12 of the Aboriginal Peoples Act, 1954. Any compensation pursuant to these sections is in effect discretionary and arbitrary since it is up to the authorities to decide on the quantum of compensation to be paid to the Orang Asli (Ismail, 2005). There is no fixed guideline. The compensation payable to the Orang Asli under these sections is only for the loss of productive trees, buildings and any activities on the land. In reality, the amount paid to the Orang Asli as compensation for their loss of productive trees and buildings is inadequate (Ismail, 2005; Endicott & Dentan, 2004).

Recognition for Compensation of Orang Asli Native Lands

Generally, it was agreed that the determination of Orang Asli native land compensation will be based on an assessment of the specific traditional land rights and interests, and on the specific effects of an activity on their traditional land. In order for Orang Asli native land to be recognised in common law, the 'facts' of Orang Asli native land have to be determined through translation from one cultural domain to Malaysian common law. It is important, therefore, to ascertain what the current limits of that common law translation are. The translation problems involved are not new; there is a long experience of them under the Aboriginal Peoples Act, 1954.

Many of the same difficulties are arising in native title discussion. As accepted by Justices Deane and Gaudron in Mabo v Queensland (1992) 175 CLR 1 (Mabo, 1992), it is correct to assume that the traditional interests of the native inhabitants are to be respected even though those interests are of a kind unknown to English law. Justice Brennan also argued that the general principle that the common law will recognise a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title (Mabo, 1992). The extent of that exception is uncertain and is still being explored (Smith, 2001). As for Orang Asli native land, the compensation will require an innovative jurisprudential approach that acknowledges the Orang Asli native land. Therefore, legal and comparative studies are required to equate Orang Asli native land compensation rights and interests either to Western property law concepts and precedents, or to market land valuation methodology (Cheah 2004; Smith, 2001).

The existing conventional principles relating to special value to the owner or solatium[3] are of little direct applicability, if any, in assessing the value of Orang Asli native land. Freehold market value notion does not cover that part of the value that reflects the cultural-based losses inflicted on past, current and future generations.

The economic, social, material and spiritual domains of Orang Asli life are seen as inseparably and fundamentally

[3] A solatium is an addition to the value of the land and for other heads of compensation; the dispossessed owner is entitled in respect of his injured feelings due to hardship, inconvenience or unspecified loss caused by compulsory acquisition. Compensation for injured feelings as distinct from financial loss or physical suffering. The compensation allowed for injury caused to the feelings of others (Sinha and Dheeraj, 2005).

connected with land. It is to be argued therefore that the principles and processes of compensation for Orang Asli native land be built upon the same paradigm. Orang Asli native land compensation is best viewed conceptually as a multi-dimensional package whose form and purpose reveal the distribution of social, legal, relations, entitlements, and value preferences. The new recognition space for Orang Asli native land compensation will expand and contract as courts deliver their judgments and parties negotiate outcomes (Cheah, 2004). Nonetheless, one principle should remain: that OANL constitutes a proprietary right, and that its extinguishment amounts to an acquisition of property (Sagong Tasi, 2002).

Determining the value of Orang Asli native land for the purposes of compensation will focus on what kind of property right it is and, in particular, what constitutes 'property', 'loss', 'extinguishment', 'adequate' and 'fair'. There will continue to be contending reviews of these concepts, in legal, economic and other forums across the world, and a more socially-oriented vision of entitlement is starting to emerge (Gray 1994). Such a trend is well suited to the creation of a recognition space, and facilitating practical outcomes for Orang Asli native land compensation. Common law recognition and valuation of native land for the purposes of compensation will require an expansion of the borders of the legal imagination (Macklem 1991). Hopefully, with the common law development of Orang Asli native land that is now taking place, Orang Asli can do more than simply bring their 'special knowledge and insights' to bear in native land compensation cases.

Current Thinking on The Valuation Approaches

In seeking an appropriate approach for assessing compensation for extinguishment or impairment of Orang Asli native land, it appears natural to start with the conventional methods of land valuation. However, according to Humphry (1998) a 'more flexible approach' is required which combines principles of valuation and the assessment of intangible factors such as general damages. Compensation for damage to native title will include monetary and non-monetary components or, as suggested by Whipple (1997), 'material' and 'non-material' components.

The material aspect is the loss of or effect upon the acquired land. Generally, the owner of compulsorily acquired land is entitled to either the market value of the land (*Spencer v. Commonwealth (1907) 5 CLR 418*) or the value of the land to the owner (*Pastoral Finance Association v Minister (1914) AC 1083*), whichever the higher. The former focuses on a likely arms' length agreed sale price assuming a willing buyer and a willing seller while the latter focuses on special value to the owner.

These general principles have been refined and developed for the purpose of valuing land which may not be capable of sale or in relation to which there is no apparent market, and also to value lesser interests such as leases, easements and licences (Whipple, 1997; Humphry, 1998). However, the market value attributable to a freehold title to land remains the starting point of any attempt to compensate for loss of an interest in land. It is likely that these principles are being applied or developed in the determination of compensation for loss or impairment of native title rights (Smith, 2001). In this context, the inalienability of native title should not pose a difficulty because this can be overcome by promoting the title similar to GSA title, or by expanding the meaning of customary land under Section 2 of the First Schedule to Land Acquisition Act 1960. Although the determination will involve assessing the value of the land to the native title holders, the market value of a freehold title to the same land will act

as a benchmark (Smith, 2001; Boyd, 2000). This approach has been adopted by the Privy Council, the High Court (in relation to an acquisition of land from traditional owners in New Guinea) and by courts of law in the United States (Keon-Cohen, 1995).

The essential nature of land to indigenous peoples is both metaphysical (e.g. spiritual and cultural) and material (Small, 1997). Hence, any assessment for compensation needs to consider both these dimensions. Unfortunately no court decision has so far provided for the payment of compensation for elements of cultural or spiritual value (Sheehan, 1997). Whipple (1997) suggests that the assessment of spiritual rights is outside the scope of the formal object of the discipline of valuation and should, more appropriately, be assessed by the Federal Court. Sheehan (1998), on the other hand, argues that special value to the owner and solatium can be constructed to cover compensation for the loss of access to ceremonial lands, spiritual deprivation and loss or perceived loss of social environment. In addition, Sheehan (1998) informs that an unreported decision of the Canadian Supreme Court on 11 December 1997 has explored the concept that indigenes in Canada have not only a constitutional right to own their traditional lands but also to use them in a largely unrestricted manner. Nevertheless, some likely implications of the Orang Asli native land issues for valuers in Malaysia are:

- the need for a reassessment of existing methodologies to cater these developments;
- the need to develop new valuation methodologies to determine appropriate compensation;
- the evolution of new case laws to interpret the Aboriginal Peoples Act, 1954 and the Land Acquisition Act, 1960 with regard the property rights of Orang Asli; and
- the creation of new relationships between the legal system and the valuation profession.

It is suggested that this may lead to the development of a 'new arm' (Sheehan, 1998) of land law specifically for indigenous property rights which can decide simultaneously on matters of both federal and state laws. It is also anticipated that valuers will work in partnership with other disciplines such as ethnoecological and ethnographic consultants and heritage consultants.

Boyd (2000) proposed that valuers can assess the appropriate range of values of partial and co-existing property rights of indigenous people. He raised the following two issues: the sum of the value of the partial rights does not necessarily equal the market value of the total property and, co-existing property rights usually have a detrimental effect on the partial property rights, thus, an additional co-existing right can reduce the value of an existing right. According to Fitzgerald (1997), some native title rights may co-exist with the rights granted to the 'pastoral lessee' over the same track of land. The same situation also happened in Malaysia where the Orang Asli Reserves or Areas sometimes co-exist with 'newly alienated' rights of land of private company.

Whipple (1995) identifies the three appropriate valuation approaches as:

- Inference from past transactions
- Simulation of the most probable buyer's price fixing calculus
- Normative Modeling (Contingent Valuation)

We present below a brief description of each method.

Inference from Past Transactions

This relies on evidence from relevant market activity and infers value from similar scenarios. If factual market evidence is used, this approach consequently produces the most appropriate results (Boyd, 2000; Whipple, 1995).

Since Orang Asli native land is largely forest in nature, valuation by reference to the market prices of forest should be considered by the valuers. Because of the similarity between actual forest and Orang Asli native land, it could be an advantage to adopt forest valuation for Orang Asli native land valuation; in principle, both types of lands are non-titled.

Many goods and services derived from tropical forest land uses are traded, either in local or international marketplaces, including wood products (timber, pulp and fuel), non-wood forest products (food, medicine and utensils), crops and livestock products, wildlife (meat and fish) and recreation. For those products that are commercially traded, market prices can be used to construct financial accounts to compare the costs and benefits of alternative forest land use options. In some cases, it may be necessary to adjust market prices.

Simulation Of The Most Probable Buyer's Price Fixing Calculus

This approach is appropriate where direct market evidence is not available but market based scenarios are known. When the identity of the potential buyers is established, investigation is made to elicit the way these buyers fix the price, and this is considered a market-based approach to price estimation. In this approach, probability is a major component in the simulation and probability distributions should be utilized in arriving at expected value. The success of this approach depends on the existence of offers from potential buyers (Whipple, 1995).

Contingent Valuation (CV)

CV elicits individual expressions of value from purchasers for specified increases or decreases in the quantity or quality of a non-market good. Most CV studies use data from interviews or postal surveys (Mitchell & Carson 1989). Valuations produced by Contingent Valuation Method (CVM) are 'contingent' because value estimates are derived from a hypothetical situation that is presented by the valuer to the respondent. The two main variants of CV are open-ended and dichotomous choice formats. The former involves letting respondents determine their 'bids' freely, while the latter format presents respondents with two alternatives to choose from. According to Bateman *et al* (1995), open-ended CVM format typically generates lower estimates of willingness to pay (WTP) than dichotomous choice designs.

Carson (1991) argues that the theoretical foundations of a CVM are firmer than those of other valuation techniques, because of its direct measures. Moreover, CV is the only generally accepted method for estimating non-use values, which are not traded in marketplaces and for which there are no traded substitutes, complements or surrogate goods, which can be used to attribute values. On the other hand, because no payment is made in most cases, some observers question the validity of the stated preference techniques. Critics argue that CVM fails to measure preferences accurately and does not provide useful information for policy (Diamond & Hausmann, 1994). Even practitioners accept that poorly designed or badly implemented CV surveys can influence and distort responses, leading to results that bear little resemblance to the relevant population's true WTP. Much recent attention has focused on overcoming potential sources of bias in CVM studies. Resolving these difficulties involves careful design and pre-testing of questionnaires,

rigorous survey administration, and sophisticated econometric analysis to detect and eliminate biased data.

According to Whipple (1995), in applying this approach valuer tends to make a series of assumptions on how the market should behave. Among the assumptions concerned are the types of interested buyer; market forecasting; decision criteria; alternatives available and availability of information as desired. CVM is the least accurate approach as it is necessary to make numerous assumptions (Boyd, 2000). This does not mean that CVM should not be used, because in practice, market information is not always readily available. Where this is the case, CVM might be the answer.

The use of conceptual markets under CVM is the most widely used approach in the estimating non-use value. One reason for this is the belief that CVM is the only means by which passive or non-use values can be estimated (Adamowicz *et al*, 1994; Perman *et al*, 1996). This general rule has also applied to indigenous cultural values. Another reason for preferring CVM is that non-use data collected with this approach is easier to obtain than data collected using a behaviour based approaches (Adamowicz et.al., 1998).

Preliminary Survey

Methodology

A preliminary survey was conducted in January and February 2007. The purpose of the survey was to explore the issues to payment of compensation for acquisition of Orang Asli native land in Malaysia. The questionnaire was closed-ended and was designed so that it does not take long for the respondent to answer. The respondents were the officials dealing with Orang Asli affairs in both public and private sectors as well as NGOs in Malaysia. Two hundred (200) questionnaires were sent out based on the following breakdown by geographical location: Klang Valley (N = 100), Northern Region (N = 40), Southern Region (N = 40) and East Coast (N = 20). 68 questionnaires were returned, and this gave the response rate of 34%, which is considered appropriate to generalise the results based on Ellhag and Boussabaine (1999) and Idrus and Newman (2002). The data gathered from the survey was analysed using descriptive statistical techniques. Respondents were asked to rate their response on the scale of 1 to 5 (1=strongly disagree; 5=strongly agree).

Findings

Part A: Background of the Respondents

As indicative from Table 1, the respondents in this survey are regarded as well-informed and conversant with the subject matter and are thus well-placed to give their opinion. 44% of them had involvement in 2 to 10 land acquisition projects involving Orang Asli native land with 56% having been involved in one project. Apart from that, 65% of respondents had experiences of between at least 2 years in dealing with Orang Asli affairs compared to only 35% that had less than 2 years experience. A large majority (85%) of respondents was from government sector (including universities); the private sector comprised only 15%, this being made up of 9% from Orang Asli related NGOs and 6% from private firms.

Characteristic	Frequency (N=68)	Percentage (%)
Gender		
Male	56	82
Female	12	18
Designation		
Valuation Officer / Valuer	25	37
JHEOA Officer	24	35
Land Administrator	10	15
NGO Activist	6	9
Academician	3	4
Others	0	0
Age		
21 – 30 years	3	4
31 – 40 years	21	31
41 – 50 years	38	56
51 – 60 years	4	6
> 60 years	2	3
Experience in land acquisition projects		
1 project	38	56
2 – 5 projects	28	41
6 – 10 projects	2	3
> 10 projects	0	0
Experiences in dealing with Orang Asli affairs (years)		
< 2 years	24	35
2 – 5 years	10	15
6 – 10 years	32	47
> 10 years	2	3
Type of organisation where respondents came from		
Federal / State Governments	55	81
Private Firms	4	6
Semi-Government/ Government Agency	3	4
NGOs	6	9

Table 1 : The Respondents Background
Source: Field Survey, 2007

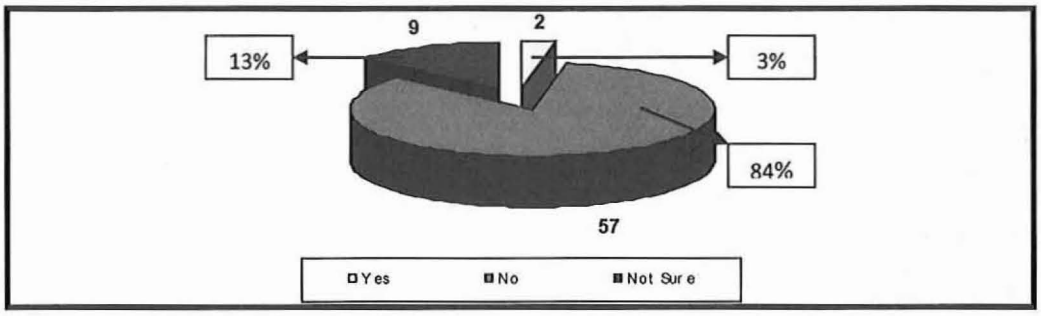

Chart 1 : Adequacy of protection on Orang Asli interests in the event of an acquisition
Source: Field Survey, 2007

Part B: General Perspectives On Land Acquisition of Orang Asli Native Land

Whether existing laws in Malaysia offer enough protection on the Orang Asli interests in the event that their native lands are affected by acquisition

As shown in Chart 1, an overwhelming 84% of respondents considered the level of protection as inadequate; only 3% were of the view that the protection was enough under the present legislations. This suggests that, to the many, property rights of Orang Asli remain as largely an unresolved issue which requires a major treatment.

Views on the issues of Orang Asli land rights

Four main issues pertaining to Orang Asli land rights scored with mean greater than 4.0 (Table 2) among the respondents. These issues are: land rights of Orang Asli are politically marginalised and not accorded adequate protection; no laws

Ranking	*Issues of Orang Asli land rights*	*Mean Score*
1	Orang Asli land rights suffer from political marginalisation, poor management and inadequate protection	4.54
2	No laws regard the Orang Asli as legal owner of Orang Asli Reserves; their rights are only as tenant-at-will of state land	4.40
3	Due to lack of mechanism to keep track of Orang Asli lands, State Government often ends up alienating the ancestral land to private developers	4.27
4	Negotiation with Orang Asli representatives and JHEOA is mandatory before compulsory acquisition	4.05
5	Given a wider interpretation to the meaning of 'land occupied under customary rights' of Section 2, Land Acquisition Act 1960 to cover Orang Asli land	3.66

Legend: 1=strongly disagree; 2=disagree; 3= neutral; 4=agree; and 5=strongly agree.

Table 2 : Views on the issues of Orang Asli land rights
Source: Field Survey, 2007

Land acquisition issues	Ranking
Land rights of Orang Asli	1
Lack of protection given by acquisition laws to Orang Asli	2
Consideration on payment of compensation for the ancestral land	3
Determination of monetary and non-monetary compensation	4
The absence of uniform approach for dealing with the quantum of compensation among state	5
Process/procedures of acquisition on Orang Asli land	6

Table 3: Ranking of the importance of land acquisition issues of Orang Asli native land
Source: Field Survey, 2007

regard the Orang Asli as legal owner of Orang Asli Reserves; their rights are only as tenant-at-will of state land; due to lack of mechanism to keep track of Orang Asli lands, State Government often ends up alienating the ancestral land to private developers and; negotiation with Orang Asli representatives and JHEOA is mandatory before compulsory acquisition. Perhaps given a wider interpretation to the meaning of 'land occupied under customary rights' of Section 2, Land Acquisition Act 1960 to cover Orang Asli land, with the mean score of 3.66, also featured as a main issue in land rights.

The importance of land acquisition issues of Orang Asli native land

Based on feedback from the survey, the general ranking of the importance of land acquisition of Orang Asli land in Malaysia is tabulated in Table 3. The land rights ranked the highest among the main concerns on land acquisition issues of Orang Asli lands. Lack of protection given by acquisition laws to Orang Asli and consideration on payment of compensation for the ancestral land ranked second and third respectively. Process or procedures of acquisition on Orang Asli land was opined by respondents as the least important. The result of this survey is concordant with research findings by Smith (2001); Boyd (2000); Sheehan (1997); Nik Yusof (1996) and Sutton (1981) who found that land rights of the indigenous peoples are the main issue in aboriginal researches.

Part C: Compensation Issues

Issues on Compensation of Orang Asli Native Land

Table 4 itemises the 7 listed issues of compensation for acquisition of Orang Asli native land. All issues (except issue at rank 7) have scored a mean score more than 4.0. This means that the respondents agreed that all the issues are important to be taken into consideration in Orang Asli land acquisition researches. Keith (1984) noted that private property is to be taken only for public use, and with the payment of just compensation and the respondents believed it was the same for Orang Asli land. Respondents disagree that Orang Asli should be allowed to challenge the award of their reserve land by engaging professional valuers. This because with current scenario, land rights of Orang Asli have yet to be resolved.

Ranking	Issues of compensation	Mean Score
1	Existing laws fail to adequately take into consideration the needs and impact of land loss on the lives of Orang Asli	4.97
2	Orang Asli lands are imbued with cultural, spiritual, communal and economic dimensions far beyond private registered land's market value	4.95
3	Compensation proposal is made available for review and consideration by representatives of Orang Asli and JHEOA before inquiry	4.83
4	Additional compensation should be added to the market value for cultural and spiritual attachment	4.79
5	Compensation elements for land acquisition of Orang Asli reserves are not uniform among states in Malaysia	4.73
6	Land acquisition powers of Orang Asli native land are for public purposes only	4.60
7	Orang Asli should be allowed to challenge the award of their reserve land by engaging professional valuers	2.36

Legend: 1=strongly disagree; 2=disagree; 3= neutral; 4=agree; and 5=strongly agree.

Table 4 : Perceptions on the issues of compensation
Source: Field Survey, 2007

Perceptions on compensation package currently practised in Malaysia

Table 5 shows the general ranking of compensation packages being implemented for acquisition of Orang Asli native lands in Malaysia. Monetary compensation was considered 'hardly adequate' by the respondents. Payment for productive trees and buildings as required by the Aboriginal Peoples Act, 1954 is not a fair basis for compensating Orang Asli native land. However, with mean score of only 3.27, respondents believed that non-monetary compensation accorded by the authority is 'adequate' but still has room for improvements.

Ranking	Compensation Package	Mean Score
1	Monetary compensation (payment on loss of trees and buildings)	2.03
2	Non-monetary compensation (e.g. resettlement program, alienation of agriculture land, recruitment of job etc)	3.27

Legend: 1=inadequate; 2=hardly adequate; 3=adequate; 4=generous; and 5=exceedingly generous

Table 5 : Perceptions on compensation package
Source: Field Survey, 2007

Suggestions on how to upgrade the unstructured nature of existing compensation

Table 6 below shows the general ranking of suggestions on how to upgrade the unstructured nature of existing compensation acquisition of Orang Asli native lands in Malaysia. All suggestions posted in the list have scored a mean score of more than 4.0, meaning that the respondents recommended that the suggestions tend to be practical and need to be implemented.

Ranking	*Suggestions*	*Mean Score*
1	Land rights of Orang Asli native land must be recognised in law	4.81
2	Compensation for land should be given due consideration based on its market value	4.78
3	Land Acquisition Act, 1960 must be amended to incorporate compensation for Orang Asli native land	4.60
4	There is a need for Malaysia to adopt other countries' practices to develop compensation framework for Orang Asli native land	4.54
5	Make the existing structures (monetary and non-monetary compensation) a law	4.53
6	Payment of non-monetary compensation must be made uniform for all states in Malaysia	4.49
7	The decisions by court in Sagong Tasi that recognised Orang Asli land rights and compensation for acquisition of their land must be implemented in due course by related parties	4.36

Legend: 1=strongly not recommended; 2=slightly not recommended; 3=neutral; 4=slightly recommended; and 5= recommended

Table 6: Suggestions on how to upgrade the unstructured nature of existing compensation
Source: Field Survey, 2007

Valuation approaches

Table 7 shows the general ranking of valuation approaches being recommended for assessing compensation for acquisition of Orang Asli native lands in Malaysia. CVM was the only approach that had high approval among the respondents for implementation in valuing Orang Asli native land. All other valuation approaches are considered less suitable. The respondents also strongly felt that the traditional valuation methods and advanced valuation techniques are not recommended for the purpose.

Ranking	Valuation approaches	Mean Score
1	Contingent Valuation Method (CVM)	4.13
2	Simulation of the most probable buyer's price fixing	3.25
3	Inference from past transactions (market evidences)	1.21
4	Traditional Valuation Methods	1.13
5	Advanced Valuation Techniques (e.g. Monte Carlo, MRA etc)	1.10

Legend: 1=strongly not recommended; 2=slightly not recommended; 3=neutral; 4=slightly recommended; and 5= recommended

Table 7 : Valuation Approaches
Source: Field Survey, 2007

Part D: Challenges in Quantifying Compensation

Challenges

As can be seen in Table 8, the respondents agreed that all listed challenges were important and need to be handled wisely. Based on the result of the survey, section 7.0 of this paper discusses in greater detail the challenges in quantifying the compensation for Orang Asli lands.

The Challenges in the Valuation of OANL for Acquisition Compensation

The challenges come mainly from the need to identify the exact nature of the rights of Orang Asli on their native lands. Also, they flow from the types of compensation that can potentially be considered.

Issue Of Orang Asli Land Rights

Generally, rights can be viewed either as legal rights and/or as economic rights.

Legal rights - Legal rights arise as a result of formal arrangements, including as a result of constitutional, statutory, judicial rulings or as part of an organised system of indigenous laws, and informal conventions and custom. The nature of property rights will affect the way resources are utilised and the net social benefit enjoyed by a community from their resources. The position of law has been such that the Orang Asli do not have legal rights over their traditional lands. This situation, however, can change if the *Tagong Tasi* case finally gets its endorsement. The *Tagong Tasi* is a landmark case in the sense that the court has, for the first time, recognised the legality of rights of Orang Asli native lands; at the moment this case is pending appeal to a higher court.

Economic rights - Economic rights depend on the enforcement of legal rights and consist of the right holder's ability to enjoy the benefits from that holding. Economic rights may include the ability to enjoy benefits and to meet responsibilities, either directly through consumption and cultural appreciation or indirectly through exchange, including barter, sale, rent, inheritance and gift giving.

Orang Asli rights and interests - Orang Asli rights and interests recognised under the Aboriginal Peoples Act, 1954 define

Ranking	Challenges	Mean Score
1	Issues of Orang Asli land rights	4.75
2	Monetary and non-monetary compensation	4.71
3	Legal Framework – Federal Constitution, 1957; Land Acquisition Act, 1960; Aboriginal Peoples Act, 1954	4.66
4	Negotiation for compensation	4.53
5	The most reliable valuation approach	4.49

Legend: 1=strongly disagree; 2=disagree; 3= neutral; 4=agree; and 5=strongly agree.

Table 8 : Challenges in quantifying Compensation
Source: Field Survey, 2007

the range and type of privileges and responsibilities holders of Orang Asli native land rights possess. The special or unique features of Orang Asli native land affect value and the way valuation might be estimated. Pre-existing Orang Asli rights and interests differ from common law concepts of title in land (Nik Yusof, 1996). Orang Asli native land rights are uniquely 'of their own kind', in that the rights provide closely intertwined, or joint, material and cultural benefits, where a community's cultural benefits are specific to place (Awang, 1996; Nik Yusof, 1996). According to Sutton (1998), differing degrees of rights and interests in land has been characterised as core and contingent. The Court decision in Sagong Tasi which recognised the Orang Asli land rights will, if endorsed, affect the valuation of compensation for Orang Asli native land in near future.

Monetary and Non-Monetary Compensation

The benefits or choices available to an individual or community are not without limit; indeed if there are, then there would be no conflict over resource use, nor would there be any need to make choices between different items, and there would be no relative differences in the value of items. Value, then, is the result of scarcity and the need to make choices. The choices available to an individual or a community are constrained by the individual's or the community's budget. Economic value indicates the relative preference for the benefits obtainable from the ownership of an item relative to the benefits obtainable from ownership of some other item and the willingness to go without something in order to obtain more of something else. Confusion about what is meant by the term 'value' has created difficulties in its application to Orang Asli native land rights. Many think of value solely in terms of market or monetary value, and often attach intrinsic value to money itself. While market prices may provide a low cost estimate of the relative value society places on the benefits obtainable from different items, neither money nor the market are necessary for value to exist. The lack of trade in Orang Asli native land rights does prevent Orang Asli from treating the benefits of their native land rights as economic goods.

Based on Sections 11 and 12 of the Aboriginal Act, 1954 compensation for acquisition of Orang Asli native land is subjected to payment of productive trees and buildings on the acquired area only. This monetary compensation is mandatory under the existing law, but does not cover payment for loss of Orang Asli ancestral land. On top of that, as being practised in Malaysia, the state government does have a package of non-monetary compensation over and above the requirement of payment for loss of trees and buildings. The non-monetary package is *ex-gratia*[4] in nature, calculated based solely on the discretion of the state and is not uniform among state government. The components of non-monetary compensation are normally inclusive of resettlement programme (which can come in the forms of, for example, a house and 2.5 hectares of agricultural land) and if the state is generous enough, this will extend to providing monthly allowances (e.g. RM500 per month) to each family for such a duration until the agricultural land is ready to produce. In relation to this, no valuation approach is needed to determine compensation as the existing structure is not paying for loss of native land. Even though the valuer is always called upon to determine compensation for loss of trees and buildings, in effect no technical approach is used. The calculation is a matter of applying the value per tree from a standard value list prepared by the Valuation and Property Services Department, Ministry of Finance Malaysia to the number of trees involved.

Legal Framework – Federal Constitution, 1957; Land Acquisition Act, 1960; Aboriginal Peoples Act, 1954

Government intervention over land development is exercised through the Land Acquisition Act (1960) and via Article 13 of the Malaysian Constitution (1957). The latter stipulates that no person may be deprived of property except in accordance with law and that no law may provide for compulsory acquisition or for the use of property without adequate compensation. With regard to land acquisition by the Federal Government, Article 83 sets out detailed procedures for land compensation as stipulated by the Malaysian Constitution (1957). Therefore, using the power contained in the Land Acquisition Act (1960), the government can acquire land for public purposes with adequate compensation as determined under Schedule 2 of the Act. Adequate compensation, therefore, as stated under the provision of Article 13(2) of the Federal Constitution refers to the amount of compensation which is decided, considering all principles stated under the First Schedule of the Land Acquisition Act 1960.

Although the State Authority, under the provision of Land Acquisition Act 1960, has the power to take possession of any private land, it does not allow the authority to violate one's right onto their private properties (Omar & Ismail, 2005). Unfortunately Orang Asli native land rights are not considered as private properties, but rather only as tenant-at-will. Under the Aboriginal Peoples Act 1954, the government perception towards Orang Asli native land is no better than that of a state land. Based on these reasons, the acquisition of Orang Asli native land is not made under the powers of Land Acquisition Act 1960 which contains the provision to compensate the land but, the compensation payable to Orang Asli only

[4] When something has been done ex-gratia, it has been done voluntarily, out of kindness or grace. In law, ex-gratia payment is a payment made without the giver recognizing any liability or legal obligation. Compensation payments are often made ex-gratia when a government or organization is prepared to compensate victims of an event such as an accident or similar, but not to admit liability to pay compensation, or for causing the event (Sinha and Dheeraj, 2005).

based on provision of Sections 11 and 12 of the Aboriginal Peoples Act 1954 for loss of productive trees, activities on land and buildings.

Negotiation for Compensation

If the compensation awarded to Orang Asli native land includes a property right transmitted across time to succeeding generations, then compensation for ongoing effects must, in all fairness, also be made available to those future generations. If the extinguishment of Orang Asli native land constitutes cultural loss of *'property for grouphood'*, that argument is all the more persuasive when, as Moustakas (1989) points out, future generations are unable to consent to current transactions that threaten their existence as a group. For that reason, compensation should include a loading for inter-generational equity. The alternative to a current loading is that compensation could be staggered by developing conjunctive conditions for its assessment over the life of an act. The challenge would be how to conduct the assessment.

Staggering the negotiation for compensation might not satisfy the needs of any party for current certainty about the exact total of compensation, especially when that amount could effectively constitute a final cap on compensation. On the other hand, such an approach would have the advantage that *"the total amount of compensation could be more directly linked to actual impacts (positive or negative); be informed by ongoing impact assessment; and be distributed to the persons actually experiencing impacts over the life of an act. It might also ensure that Orang Asli native land would have benefits remaining, to enable them to deal with the later 'closure' of a resource development project, and the need to re-establish access to, and use of, the land involved"* (Altman & Smith 1994).

For the parties involved in negotiation and mediation, as opposed to court litigation, the consideration of Orang Asli native land compensation is becoming the vehicle for developing other kinds of social and economic relationships. In the process, contending values and objectives have to be settled to mutual satisfaction. To do so, a number of practical challenges are arising, and some old policy lessons are re-emerging.

The Most Reliable Valuation Approach?

Boyd (2000) believes that the approaches discussed in Section 5 are the most appropriate approaches to use to arrive at reasoned property value of indigenous peoples. He recommended that the valuer select the approach based on the progression of the three approaches, from inference to simulation and to CV as to suit the valuation exercise. How does this translate to the situation for Malaysia? For Orang Asli native land, where changes in property rights exist, it is crucial to differentiate between market sentiment and reaction of the community. Further, no record of transaction of Orang Asli land is available in the market. This is because land ownership for Orang Asli reserves or areas have never been granted by the government except for agricultural projects under resettlement programme where the land title is to be granted after full settlement of the loan for land development by the respective Orang Asli. Thus, inference of market evidence cannot be applied in valuing compensation of Orang Asli native land. Simulation of the most probable buyer's price fixing calculus approach seems also out of question because the identity of the potential buyers cannot be established. CVM is the only approach for valuers in Malaysia to apply in determining the compensation for Orang Asli native land provided that the land right issues of Orang Asli native land are overcome.

Malaysian Experiences

Presented below are the Malaysian experiences in dealing with the calculation of compensation for Orang Asli native lands. The framework by Burke (2002) has been adopted for the layout.

Principles	Evidence	Calculation	Malaysian Experience
Insult	• The formal determination of native title rights. • (If no determination) the formulation of native title rights determined in the compensation hearing.	• Based on the most affected individual. • Minimum based loosely on non-economic loss for injury to homes in tort cases. • Maximum on the income producing value of total figure. • Individual to group adjustment.	• Pilot study showed that Orang Asli are not really insulted by acquisition, as long as the compensation packages offered by the government are reasonable. For example, compensation packages for each family of Orang Asli affected under the Privatisation Project of Bukit Lanjan Township were offered: 1 unit bungalow house; 1 unit double storey terrace houses; 1 unit low-cost apartment for each child above 15 years old; RM45,000 worth of Trust Fund unit and, a monthly allowance @ RM500 for 3 years (period of construction). Due to this attractive compensation package, only 13 families out of 158 families objected the offer.
Disturbance	• loss of access to sites, hunting grounds, other natural resources; • loss of access through the area to other areas;	As above	• Based on *Adong Kuwau* case, a total of RM26.5 million was awarded to the community of Orang Asli due to loss of hunting grounds and traditional resources. This payment is for loss of income so affected, for a period of 25 years. • Recognition for disturbance is also given by Article 4 of Federal Constitution, 1957 which allows the Orang Asli to roam/subsist in any state forest in the country. Therefore, an acquisition of their reserve will not so affect their traditional life.

Mental Distress	• Feelings about the loss of homeland; • concern about sites and the proposed use of the country; • concerns about future generations; • Expert anthropological evidence on the above.	As above	• To overcome mental distress of Orang Asli community, the government has implemented the following policy for Resettlement Program: appropriate infrastructure and amenities at resettlement location; motivation programme for Orang Asli to adapt to new environment and life; special and systematic agricultural projects to ensure stable income for Orang Asli at present and in the future and, land ownership for them after the development cost of such project is fully settled by the respective Orang Asli.
Economic Value	• Justification of the selection of analogy (freehold, leasehold, profit a prende etc). • Expert evidence of valuation of the market value of the chosen analogy, considering the highest and best use.	The straightforward notional figure similar to special damages.	• Attempts have been made by the Ministry of Rural Development to alienate land to each family of Orang Asli in Malaysia. If approved, each family will be entitled to 2.5 hectares of land which comprises 2 hectares of agricultural land, 0.4 hectare of orchard land and 0.1 hectare of housing plot. The site may or may not be at the same site where the existing Orang Asli being inhabited. • In *Sagong Tasi* case, the Court has ruled that the land rights of Orang Asli Reserve are recognized as similar to private titled land. But, on compensation, the Court still does not consider the Land Acquisition Act, 1960 compensation structure applicable to Orang Asli land. The case is now pending appeal at Court of Appeal. If the previous decision is sustained, this will give a full recognition of Orang Asli land rights and, compensation for the market value of land will be materialised.

Younger Generation	• Age composition of the native title group, current instruction of the younger generation in traditional laws customs relating to the area; • The typical time span of each generation based on genealogical records of the native title group; • Expert evidence of current long-term return on secure investments.	An estimation based on projected real returns using the compound interest formula and making allowances for inflation and taxation.	• Under the present policy, the government is encouraging the Orang Asli to leave the forest and live near to other communities. By this move, it is easy for the government to provide education, healthcare and, development to Orang Asli that have long been benefited by other communities. If they still refuse, their younger generation is encouraged to move out and stay at government school hostels to ensure proper education is given to them. • Under 'Program Pembangunan Minda' (Mindset Development Program) by JHEOA, the younger generation is trained to adopt real world challenges and integrate with other communities. • The idea is to avoid political marginalisation for younger generation of Orang Asli as experienced by their older generation (if any).

Conclusion

This paper has discussed the importance of examining the issue of Orang Asli native land compensation since there is no judicial guidelines and valuation discourse on most of the basic issues of land rights and valuation approaches in place. According to the survey results, the respondents perceived that existing laws fail to adequately take into consideration the needs and impact of land loss on the lives of Orang Asli (this is in contrast to the situations in Australia and Canada where the perceptions are that the compensations for native lands are well-received by the native communities). Furthermore they claimed that monetary compensation was considered 'hardly adequate' and payment for productive trees and buildings as required by the Aboriginal Peoples Act, 1954 is not a fair basis for compensation of an acquisition of Orang Asli native land. However, the respondents believed that non-monetary compensation accorded by the authority is 'adequate' but still has room for improvement.

It was accepted that most of the compensation for acquisition of Orang Asli native land rights is likely to be for non-economic loss, structuring this potentiality should be given due focus. The aim is to seek judicial solutions to compensation problems of Orang Asli native land. The difficulties encountered are as to whether Orang Asli native land compensation should be the subject of legislative reform. This would guide the courts, to a certain extent, by listing relevant factors to be taken into account when assessing compensation. Among the factors are economic and non-economic loss; individual and communal rights; disruption to cultural heritage; acquiring body's ability to pay, and; the likely effect

of the payment of compensation on other sources of income and support.

In Malaysia, the case of Sagong Tasi is under appeal at the Federal Court. It will be interesting to observe the results. Nonetheless, it is clear that the decision will have implications for the future treatment of valuation for compensation of Orang Asli native lands. Notwithstanding this, negotiation could provide an effective means for reaching a speedy conclusion to a value dispute between the parties involved, particularly in current scenarios of uncertainty.

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