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Malaysia-EU FLEGT-VPA Stakeholder Consultations and Native customary Land Rights in Malaysia

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Trees and Forests Grow on Land and Land is Life

- At every point of change in land use and land development the indigenous inhabitants are directly affected
- Unless they are able to retain control of their land and territories the survival of indigenous groups as identifiable and distinctive societies and culture is seriously endangered.

The FLEGT-VPA Consultative Process and Native Rights

- In Malaysia, the FLEGT- VPA multi-stakeholder consultation process has given voice to long standing conflict over recognition of aboriginal or native claims in forest lands.

The Consultation Process

- Critical issue throughout the consultations for and by native groups: Native Customary Land Rights (NCR)
- Created a greater awareness of the problems affecting NCR
- Withdrawal of social NGOs from the process - Indigenous community leaders rising 'to own' the problem and ask to be part of the consultations as a unified voice

A key component of the TLAS: definition of legal timber

- Under the VPA the definition of legal timber is as follows:

*Timber harvested by licensed persons from approved areas and timber and timber products exported **in accordance with laws, regulations and procedures pertaining to forestry, timber industry and trade of Malaysia***

Meaning of 'existing laws'

The state's position

- The Forest Ordinance 1958
(use rights and native privileges)
- The Land Code 1958, s 2, 5, 6, 10,15
- Codified adat (customary laws)

The indigenous peoples' stand

- The Forest Ordinance 1958
- The Land Code 1958, s2, 5, 6, 10,15
- Codified adat
- Non codified *adat* (native law and customs as recognised by judicial decisions)
- Art 160 (2) Federal Constitution

Definition of Law under Art 160 of the Federal Constitution

Art 160 - Law includes:

- **Written law** (Acts, Enactments, Ordinances)
- Principles of **common law** and equity (judge made laws) and
- **Customs and usage** having the force of law.

Safeguards for Native Customs

- 1. Parliament may make laws on any matter during emergency
- 2. Article 150 (6A) Clause (5)
shall not extend powers of Parliament to any matter of Islamic law or the customs of the Malays, or with respect **to any matter of native law and customs in the State of Sabah and Sarawak**

Native Customary Rights to Land (NCR) Sarawak Land Code 1958

Section 5 (1) NCR must be created before 1 Jan 1958

s 5(2) NCR may be created through:

- (a) The felling of virgin jungle and occupation of the land
- (b) Planting of land with fruit trees
- (c) Occupation of cultivated land
- (d) Use of land for a burial ground or shrine
- (e) Use of land for rights of way
- (f) **Any other lawful means (deleted in 2000)**

Establishing Native Title

Mabo (No.2) v Queensland (1992) 175 CLR 1.

Justice Brennan:

1. Native title has its origin in and is given by the **traditional laws** acknowledged and observed by the indigenous inhabitants of a territory.
2. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

Recognition of customary title (Following *Mabo* (No.2))

1. *Adong bin Kuwau v Kerajaan Negeri Johor*
[1997] 1 MLJ 418 , [1998] 2 MLJ 158
2. ***Nor anak Nyawai & Ors v Borneo Pulp Plantations Sdn Bhd v Superintendent of Lands and Survey & Anor* [2001] 2 CLJ 297;
[2006]**
3. *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2005] 6 MLJ 289
4. *Superintendent of Lands & Surveys v Madeli bin Salleh*
(2008) 2 MLJ 677.

Pemakai Menoa

- *Pemakai menoa* (lit; land to eat from) is an area of land held by a distinct longhouse or village community.- exercised within a garis menoa – territorial boundaries between villages marked by natural features, like rivers, hills etc
- *Tana umai* : cultivated lands.-farms, gardens, fruit groves
- *Temuda* – formerly cultivated land at various stages of young wild growth.
- *Tembawai* – old longhouse sites
- *Pendam* – cemetery and burial sites
- *Pulau*- forests preserved for communal use
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Arguments by and for native groups

- Native Claims over forest areas need to be demarcated and settled prior to designation as permanent forest.
- Timber harvested from areas being claimed by natives or in dispute should be considered illegal timber (dispute must be settled through due process before timber harvesting)

Summary: The Nature and Content of Native Title

1. Inherent, pre-existing rights
2. Sourced in exclusive occupation of land and in native laws and custom
3. The customary rights do not depend on statute for their existence.
4. It is a right acquired in law, and not based on any document of title

Conclusion

- A morally defensible concept of native rights must incorporate the statutory, the common law and the native perspective.
- Where a right is provided for in statute, any inadequacy must be compensated by reference to constitutional provisions for “full recognition” of native rights